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**SUPREME COURT OF THE UNITED STATES**

**OCTOBER TERM, 1939**

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**No. 397**

**THE UNITED STATES OF AMERICA, APPELLANT**

**vs.**

**THE BORDEN COMPANY, CHARLES L. DRESSEL, HARRY  
M. RESER, ET AL.**

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**APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR  
THE NORTHERN DISTRICT OF ILLINOIS**

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**FILED SEPTEMBER 18, 1939**

SUPREME COURT OF THE UNITED STATES  
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1 [Caption omitted.]

3 In United States District Court for the Northern District of  
Illinois, Eastern Division

Of the October Term, in the Year 1938

*Indictment*

Filed Nov. 1, 1938

The grand jurors of the United States of America, empaneled and sworn in the District Court of the United States for the Eastern Division of the Northern District of Illinois, at the July Term of said Court, in the year 1938, having begun but not finished during said July Term of Court, among other things, an investigation of the matters charged in this indictment; and having continued to sit by order of this Court in and for said Division and District during the September and October Terms of said Court for the purpose of finishing investigations begun but not finished during said July Term of said Court; and inquiring within and for said Division and District at the October Term of said Court, in the year 1938, do upon their oaths find and present as follows, to wit:

COUNT ONE

I. PERIOD OF TIME COVERED BY THE INDICTMENT

1. Each of the allegations hereinafter contained in this indictment shall be deemed to refer to the period beginning in the month of January 1935, and continuing thereafter up to and including the date of the presentment of this indictment, unless otherwise expressly stated.
2. Each allegation hereinafter made in this indictment that an act has been done by any of the defendants herein, or by any other person, shall be deemed to be an allegation that such act was performed within three years next preceding the date of the presentment of this indictment, unless otherwise expressly stated.

II. DEFINITIONS

Whenever the following words are used in this indictment, they shall be deemed to have the meanings set forth below:

3. Fluid Milk.—Fluid milk is cow's milk produced for sale and consumption in fluid form as whole milk.
4. Approved Dairy Farm.—An approved dairy farm is a farm approved by the Board of Health of the City of Chicago for the production of fluid milk for shipment into the City of Chicago.

5. Producer.—A producer is any person, firm, or corporation owning or possessing one or more cows and selling in the form of fluid milk a part or all of the milk produced by such cows.
6. Member-Producer.—A member-producer is a producer belonging to the Pure Milk Association, an association more fully described in paragraphs 34 and 35 of this indictment.
7. Independent Producer.—An independent producer is a producer not belonging to the Pure Milk Association.
8. Handling.—Handling is pasteurizing and bottling fluid milk.
9. Distributor.—A distributor is a person, firm, or corporation engaged in the business of receiving, handling, distributing, and selling fluid milk, in whole or in part, in the City of Chicago.
10. Major Distributor.—A major distributor is any one of the distributors named in paragraph 25 of this indictment.
11. Independent Distributor.—An independent distributor is any distributor not a major distributor.
12. Association Member.—An association member is any distributor who is a member of Associated Milk Dealers, Inc., a corporation more fully described in paragraphs 30 to 32 of this indictment.
13. Non Association Member.—A non association member is any distributor not a member of Associated Milk Dealers, Inc.
14. Country Station.—A country station is any place, premise, or establishment located outside the City of Chicago where milk is collected preparatory to shipment to the City of Chicago.
15. Milk Plant.—A milk plant is any place, premise, or establishment in the City of Chicago where milk is collected, handled, or otherwise prepared for distribution and sale.

### III. NATURE OF THE TRADE AND COMMERCE INVOLVED

16. The City of Chicago, Illinois, has a population in excess of three and one-half million people and is a large market for the distribution and sale of fluid milk. In excess of a million quarts of fluid milk are distributed and sold each day in the City of Chicago.
17. There have been and there are in the States of Illinois, Indiana, Michigan, and Wisconsin more than fifteen thousand approved dairy farms, of which approved dairy farms more than 50% are located in the states other than the State of Illinois. There are many unapproved dairy farms which are located within the same area as that wherein approved dairy farms are located.
18. The production of milk destined for ultimate distribution and sale as fluid milk in the City of Chicago, its transportation to the said City, its preparation for distribution and sale within the said City, and its distribution and sale within the said City, have been and are regulated by an ordinance of the said City and by rules and regulations promulgated and adopted by the Board of Health of the City of Chicago.
19. Fluid milk by its nature is perishable; it cannot be stored and it must reach the consumer within a short time after its production.

The ordinance of the City of Chicago and the rules and regulations adopted by the Board of Health of the said City require that all milk produced for sale as fluid milk in the said City must be delivered daily to a place, premise, or establishment where milk is collected preparatory to pasteurization elsewhere, or to a pasteurization plant where milk is handled and otherwise prepared for distribution and sale as fluid milk. The said ordinance and the said rules and regulations also require that pasteurized fluid milk sold in the said City must be sold not later than noon of the day beginning twenty-five hours after the date of pasteurization, and that certified fluid milk sold in the said City must be sold not later than the day beginning thirty hours after the time the said milk is drawn from the cow.

20. There have been and there are more than one-hundred twenty-five distributors who purchase fluid milk from producers for distribution and sale in the City of Chicago.

21. Fluid milk produced on the said approved dairy farms is transported to the City of Chicago in two ways: In some instances the said fluid milk is transported from approved dairy farms to country stations located nearby, where the said fluid milk is commingled and combined with fluid milk from other approved dairy farms, and thereafter transported from the said country stations to the City of Chicago by means of over-the-road motor vehicles and by railroad. In other instances, said fluid milk is transported directly to the City of Chicago from approved dairy farms by over-the-road motor vehicles.

22. Of the fluid milk produced on approved dairy farms situated in the States of Illinois, Indiana, Michigan, and Wisconsin, approximately forty percent has been and is produced on approved farms located in the States of Indiana, Michigan, and Wisconsin. The said fluid milk so produced on approved dairy farms in the States of Indiana, Michigan, and Wisconsin has been and is transported and shipped daily in interstate commerce by over-the-road motor vehicles and by railroad into the City of Chicago in the State of Illinois.

23. The fluid milk produced on the approved dairy farms in the States of Indiana, Michigan, and Wisconsin, and so transported and shipped in interstate commerce into the City of Chicago, is combined and commingled soon after it leaves the said approved dairy farms and while it is in the current of interstate commerce, with fluid milk produced in the State of Illinois. The fluid milk produced in the State of Illinois, and distributed and sold in the City of Chicago, is produced, and is purchased by distributors with a view to, and for the purpose of, being added to an existing current of interstate commerce.

24. The production of the said fluid milk in the States of Illinois, Indiana, Michigan, and Wisconsin, its transportation into the said City of Chicago, and its distribution and sale in the said City, has constituted and does constitute trade and commerce in fluid milk among the several states of the United States within the meaning of

the Act of Congress approved July 2, 1890, entitled, "An Act To protect trade and commerce against unlawful restraints and monopolies."

#### IV. THE DEFENDANTS

25. The grand jurors aforesaid, upon their oaths aforesaid, do further present that the following-named corporations are hereby indicted and made defendants herein. (The said defendants are hereinafter collectively referred to as "major distributors.") Each of the major distributors, during the period of time covered by this indictment, has been and is a corporation duly authorized to do business under and by virtue of the laws of the state of incorporation as indicated below; has had its principal place of business as indicated below; and has engaged in the business of distributing and selling fluid milk in the City of Chicago:

Name of corporation	State of incorporation	Date of incorporation	Principal place of business
The Borden Company	New Jersey	1899	350 Madison Avenue, New York, New York. (Chicago Office: 3638 North Broadway.)
Borden-Wieland, Inc.	Delaware	1934	350 Madison Avenue, New York, New York. (Chicago Office: 3638 North Broadway.)
Bowman Dairy Company	Illinois	1891	140 West Ontario Street, Chicago, Illinois.
Sidney Wanzer & Sons, Inc.	Illinois	1922	124 West Garfield Boulevard, Chicago, Illinois.
Hundling Dairy Company	Illinois	1912	6949 Stony Island Avenue, Chicago, Illinois.
Capitol Dairy Company	Illinois	1920	4325 South Wabash Avenue, Chicago, Illinois.
Western-United Dairy Company	Illinois	1936	1451 Gresham Street, Chicago, Illinois.
Western Dairy Company, Inc.	Illinois	1908	1451 Gresham Street, Chicago, Illinois.
United Dairy Company	Illinois	1911	1451 Gresham Street, Chicago, Illinois.
International Dairy Company	Illinois	1912	1910 South Ashland Avenue, Chicago, Illinois.

26. The defendant Western-United Dairy Company was incorporated on December 28, 1936, for the purpose of reorganizing and consolidating the business of the defendant Western Dairy Company, Inc., and the business of the defendant United Dairy Company. Since December 28, 1936, the defendants Western-United-Dairy Company, Western-Dairy Company, Inc., and United Dairy Company have been affiliated corporations and have been under common control and management.

27. The said major distributors sell approximately sixty-five per cent of the fluid milk sold in the City of Chicago.

28. Each of the defendant major distributors purchases fluid milk which is produced in states outside of Illinois and transported to the City of Chicago. Each of the defendant major distributors commingles the fluid milk received from states outside the State of Illinois with milk produced within the State of Illinois, and then sells the commingled milk in the City of Chicago as one product. All of the defendant major distributors maintain country stations

in states outside of the State of Illinois, receive fluid milk at the said country stations, and transport the said milk, or cause it to be transported, in interstate commerce to the City of Chicago. The following major distributors maintain country stations in the following states:

## Major distributor:

	State
The Borden Company	Indiana:
Borden-Wieland, Inc.	Wisconsin.
Bowman Dairy Company	( Indiana.
Sidney Wanzer & Sons, Inc.	Wisconsin.
Hunding Dairy Company	Indiana.
Capitol Dairy Company	Indiana.
Western-United Dairy Company	Indiana.
Westerly Dairy Company, Inc.	Indiana.
United Dairy Company	Wisconsin.
International Dairy Company	Indiana.

29. The individuals whose names and addresses are set forth below are hereby indicted and made defendants herein. Each of the said individuals now is associated with or employed by the defendant corporation and holds the official title or position as shown below, or has been so associated or employed or has so held an official title or position during the period covered by this indictment and within three years prior to the date of the presentment of this indictment. Said individual defendants, during the period covered by this indictment, and within three years prior to the date of its presentment, have been actively engaged in the management, direction, and control of the affairs, policies, and acts of the respective defendant corporations, and particularly those affairs, policies, and acts of said corporation described in this indictment, and have authorized, ordered, and done the acts of said corporations constituting the offenses hereinafter charged in this indictment:

Name of individual	Address	Official title or position	Defendant corporation with which connected
D. B. Peck	Chicago, Ill.	President.	Bowman Dairy Company.
Francis H. Kullman, Jr.	Chicago, Ill.	Vice-President.	Bowman Dairy Company.
M. J. Metzger	Chicago, Ill.	Vice-President.	Bowman Dairy Company.
H. T. Adamson	Chicago, Ill.	Treasurer.	Bowman Dairy Company.
J. F. Philipp	Chicago, Ill.	Vice-President.	Bowman Dairy Company.
H. W. Comfort	New York, N. Y.	Vice-President, The Borden Company, in Charge of Fluid Milk Operations.	Bowman Dairy Company.
S. M. Ross	Columbus, Ohio.	District Chairman, Midwest District of the Borden Company.	The Borden Company. Borden-Wieland, Inc.
Charles L. Dressel	Chicago, Ill.	President, Borden-Wieland Division of the Borden Company.	The Borden Company. Borden-Wieland, Inc.
Harry M. Reser	Chicago, Ill.	Vice-President, Borden-Wieland Division of The Borden Company.	The Borden Company. Borden-Wieland, Inc.
W. A. Baril	Chicago, Ill.	Vice-President; Borden-Wieland Division of The Borden Company.	The Borden Company. Borden-Wieland, Inc.
O. O. Smaha	Chicago, Ill.	Asst. Treasurer, Borden-Wieland Division of The Borden Company.	The Borden Company. Borden-Wieland, Inc.
R. W. Nessler	Chicago, Ill.	Asst. Secretary, Borden-Wieland Division of The Borden Company.	The Borden Company. Borden-Wieland, Inc.

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Name of individual	Address	Official title or position	Defendant corporation with which connected
F. A. Webb.....	Chicago, Ill.....	Director, Bureau of Safety, Borden-Wieland Division of The Borden Company.	The Borden Company. Borden-Wieland, Inc.
Gordon B. Wanzer.....	Chicago, Ill.....	Vice-President.....	Sidney Wanzer & Sons, Inc.
H. Stanley Wanzer.....	Chicago, Ill.....	Vice-President.....	Sidney Wanzer & Sons, Inc.
Carl W. Hunding.....	Chicago, Ill.....	Vice-President.....	Hunding Dairy Company.
Hyman I. Freed.....	Chicago, Ill.....	President.....	Capitol Dairy Company.
Louis G. Glick.....	Chicago, Ill.....	Chairman of the Board, Western-United Dairy Company.....	Western-United Dairy Co.
Maurice S. Dick.....	Chicago, Ill.....	President, Western-United Dairy Company.....	United Dairy Company.
Samuel S. Dick.....	Chicago, Ill.....	Treasurer, Western-United Dairy Company.....	Western Dairy Company, Inc.
Louis Janata.....	Chicago, Ill.....	Secretary.....	Western United Dairy Co., Inc.

30. The Associated Milk Dealers, Inc., has its principal place of business at 309 West Jackson Boulevard, Chicago, Illinois, and is a trade association organized as a corporation on January 14, 1935, under and by virtue of the laws of the State of Illinois, and during the period covered by this indictment, it has been duly authorized to do business under and by virtue of the laws of the State of Illinois. The said corporation is hereby indicted and made a defendant herein. Substantially all of the members of Associated Milk Dealers, Inc., are distributors doing business in the City of Chicago.

31. The income of Associated Milk Dealers, Inc., is derived from dues and assessments levied against its members on the basis of the number of routes which each member operates. During the period covered by this indictment and within the three years prior to the date of its presentment, all of the major distributors have been members of Associated Milk Dealers, Inc., and throughout the said period of time have contributed in excess of seventy-five per cent of the total annual income of the said Associated Milk Dealers, Inc.

32. During the period covered by this indictment and within the three years prior to the date of its presentment, the said defendant major distributors have dominated and controlled the business and activities of the said Associated Milk Dealers, Inc. The said domination and control has been exerted and maintained by means of, among others, the activities of individual defendants who were officers or representatives of the major distributors and who were also officers and directors of the said Associated Milk Dealers, Inc. During all or part of the said period of time, the following defendants, representing the defendant major distributors indicated below, have held the official title or position with the defendant Associated Milk Dealers, Inc., indicated below:

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Name of individual	Official title or position with Associated Milk Dealers, Inc.	Defendant major distributor with which connected
W. A. Baril	Vice-President and Director	The Borden Company
D. B. Peck	Vice-President and Director	Borden-Wieland, Inc.
H. Stanley Wanzer	Vice-President and Director	Bowman Dairy Company
Carl W. Hunding	Director	Sidney Wanzer & Sons, Inc.
Hyman I. Freed	Chairman of the Committee on Fair Trade Practices, and Director	Hunding Dairy Company
Louis G. Glick	Vice-President	Capital Dairy Company
Maurice S. Dick	Director	United Dairy Company
Louis Janata	President and Vice-President	Western United Dairy Company
		Western Dairy Company, Inc.
		United Dairy Company
		Western-United Dairy Company
		Western Dairy Company, Inc.
		International Dairy Company

33. The individuals whose names and addresses are set forth below are hereby indicted and made defendants herein. Each of the said individuals is associated with the defendant Associated Milk Dealers, Inc., and holds the official title and position shown below, and has been so associated and has so held the said official title and position during the period covered by this indictment and within three years prior to the date of the presentment of this indictment. The said individual defendants have, during the period covered by this indictment, been actively engaged in the management, direction, and control of the affairs, policies, and acts of the defendant Associated Milk Dealers, Inc., particularly those affairs, policies, and acts of said defendant Associated Milk Dealers, Inc., described in this indictment, and have authorized, ordered, and done the acts of said corporation constituting the offenses, hereinafter charged, in this indictment:

Name of individual	Address	Official title or position with Associated Milk Dealers, Inc.
Paul Potter	Chicago, Ill.	Executive Secretary
Otto Black	Chicago, Ill.	Field Representative
W. A. Baril	Chicago, Ill.	Vice-President and Director
D. B. Peck	Chicago, Ill.	Vice-President and Director
H. Stanley Wanzer	Chicago, Ill.	Vice-President and Director
Carl W. Hunding	Chicago, Ill.	Director
Hyman I. Freed	Chicago, Ill.	Chairman of the Committee on Fair Trade Practices, and Director
Louis G. Glick	Chicago, Ill.	Vice-President
Maurice S. Dick	Chicago, Ill.	Director
Louis Janata	Chicago, Ill.	President and Vice-President

34. The Pure Milk Association has its principal place of business at 608 South Dearborn Street, Chicago, Illinois, and was organized and incorporated on January 11, 1926, under an act of the General Assembly of the State of Illinois, entitled "The Cooperative Marketing Act," approved June 21, 1923. Since the date of its incorporation and during the period covered by this indictment, the defendant Pure Milk Association has been duly authorized to do business under and by virtue of said Act. The said Pure Milk Association is hereby indicted and made a defendant herein. The Pure Milk Association, during the period covered by this indictment, has had a membership in excess of twelve thousand producers. Throughout the period cov-

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ered by this indictment, approximately fifty per cent of all the members of the Pure Milk Association have been located outside of the State of Illinois.

35. Each member of the Pure Milk Association sells fluid milk pursuant to a membership agreement entered into with the Pure Milk Association, by the terms of which the Pure Milk Association is constituted sole and exclusive agent for the purpose of marketing the said milk. In excess of eighty per cent of all the milk produced by the members of the Pure Milk Association has been and is produced on approved dairy farms. Approximately seventy-five per cent of the said fluid milk so produced on approved dairy farms by members of defendant Pure Milk Association has been and is purchased by the major distributors.

36. The individuals whose names and addresses are set forth below are hereby indicted and made defendants herein. Each of the said individuals is associated with or employed by the defendant Pure Milk Association and holds the official title or position shown below or has been so associated or employed or has so held the said official title or position during the period covered by this indictment and within three years prior to the date of its presentment. Said individual defendants have, during the period covered by this indictment, been actively engaged in the management, direction, and control of the affairs, policies, and acts of the defendant Pure Milk Association, and particularly those affairs, policies, and acts of said defendant Pure Milk Association described in this indictment, and have authorized, ordered, and done the acts of said corporations constituting the offenses hereinafter charged in this indictment:

Name of individual	Address	Official title or position with Pure Milk Association
Don N. Geyer	c/o H. P. Hood & Sons, Boston, Mass.	Secretary and General Manager.
Edward F. Cooke	Elmhurst, Ill.	Director of Public Relations.
E. E. Houghtby	Shabbona, Ill.	Director and Treasurer.
F. J. Knox	Waukegan, Ill.	Officer of Marketing Department.
Lowell D. Oranger	Maple Park, Ill.	Manager of Fluid Sales Department.
John P. Case	Naperville, Ill.	President and General Manager.

37. The Milk Dealers Bottle Exchange (sometimes hereinafter referred to as the Bottle Exchange) has its principal place of business at 2355 Blue Island Avenue, Chicago, Illinois; and is a corporation organized on December 24, 1918, under and by virtue of the laws of the State of Illinois. The said Milk Dealers Bottle Exchange is hereby indicted and made a defendant herein. The Bottle Exchange was duly authorized to do business during the period covered by this indictment under and by virtue of the laws of the State of Illinois, and during said period was engaged within the city of Chicago in the business of collecting, exchanging, and distributing milk bottles, cans, and other containers used by distributors. Large special discounts are allowed to the stockholders of the Bottle Exchange,

but are not allowed to nonstockholders, on charges for services rendered.

38. Throughout the period covered by this indictment, the defendant major distributors together have owned in excess of eighty per cent of the total outstanding stock of the defendant Milk Dealers Bottle Exchange and have completely dominated and controlled the activities and business of said Milk Dealers Bottle Exchange. The said domination and control has been exerted and maintained by means of, among others, officers and representatives of said defendant major distributors, who are also officers and directors of the Bottle Exchange. The following individuals, representing the defendant major distributors, have held or now hold the official title or position with the defendant Milk Dealers Bottle Exchange indicated below:

Name of individual	Official title or position with Milk Dealers Bottle Exchange	Defendant major distributor with which connected
R. W. Neesler	President and Director	The Borden Company. Borden-Wieland, Inc.
F. A. Webb	Secretary and Director	The Borden Company. Borden-Wieland, Inc.
Francis H. Kullman, Jr.	Vice-President and Director	Bowman Dairy Company.
Sidney Wanzer, III	Assistant Secretary	Sidney Wanzer & Sons, Inc.
H. Stanley Wanzer	Director	Sidney Wanzer & Sons, Inc.
B. M. Hundling	Director	Hundling Diary Company.
Maurice S. Dick	Director	Western United Dairy Co. Western Dairy Company, Inc. United Dairy Company.

39. The Milk Wagon Drivers' Union, Local 753, International Brotherhood of Teamsters, Chauffeurs, Stablemen, and Helpers of America, an affiliate of the American Federation of Labor, of 220 South Ashland Boulevard, Chicago, Illinois (hereinafter referred to as Local 753), is a voluntary unincorporated association of individuals and has continuously existed as such throughout the period of time covered by this indictment. The said Local 753 is hereby indicted and made a defendant. The individual members of Local 753 are employed by distributors in the City of Chicago in connection with the distribution and sale of fluid milk in the said City. Local 753, throughout the period covered by this indictment, has had a membership in excess of five thousand members. At all times throughout the period covered by this indictment, approximately seventy-five per cent of all the employed members of Local 753 have been employed by the major distributors.

40. The individuals whose names and addresses are set forth below are hereby indicted and made defendants herein. Each of the said individuals is now associated with Local 753 and now holds the official title or position shown below; and has been so associated, and has so held the said official title or position throughout the period covered by this indictment and within three years prior to the date of its presentment. The said individual defendants, during the period covered by this indictment, have been actively engaged in the management, direction, and control of the affairs, policies, and acts of

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Local 753, particularly those affairs, policies and acts described in this indictment, and have authorized, ordered and done the acts of Local 753 constituting the offenses hereinafter charged in this indictment:

Name of individual	Address	Official title or position with Milk Wagon Drivers' Union
Robert G. Fitchie	Chicago, Ill.	President.
James Kennedy	Chicago, Ill.	Vice-President.
Steve Sumner	Chicago, Ill.	Secretary-Treasurer.
Fred C. Dahms	Chicago, Ill.	Recording Secretary.
F. Ray Bryant	Chicago, Ill.	Trustee.
John O'Connor	Chicago, Ill.	Business Agent.
David A. Riskind	Chicago, Ill.	Attorney.

41. Leslie G. Goudie has been, throughout the period covered by this indictment; and now is, president of the Joint Council No. 25 of the International Brotherhood of Teamsters, Chauffeurs, Stablemen and Helpers of America, an affiliate of the American Federation of Labor, and is hereby indicted and made a defendant herein. The Joint Council is an advisory body to the forty-seven local unions comprising all of the teamsters' and chauffeurs' unions in the City of Chicago, including Local 753, and is composed of the officers of each local union.

42. Daniel A. Gilbert, of Chicago, Illinois, a police officer of the City of Chicago, assigned to the office of the State's Attorney of Cook County, Illinois, as chief investigator, is hereby indicted and made a defendant herein.

43. Herman N. Bundesen, of Chicago, Illinois, a member of and president of the Board of Health of the City of Chicago, is hereby indicted and made a defendant herein. Paul Krueger, of Chicago, Illinois, chief sanitary officer in charge of the dairy section of the Board of Health of the City of Chicago, and William J. Guerin, chief of city dairy inspection of the Board of Health of the City of Chicago are hereby indicted and made defendants herein.

44. The following individuals, who acted as arbitrators in arbitration proceedings hereinafter described, are hereby indicted and made defendants herein:

Leland Spencer, of Ithaca, New York.

W. A. Wentworth, of New York, New York.

45. Whenever it is hereinafter alleged that any defendant corporation or defendant association did do or perform any act or thing the said allegation shall be deemed to mean that each of the said persons named herein as defendants and described as officers or agents of, or as being or having been employed by or associated with, the said defendant corporation or defendant association, did authorize, order, direct, participate in and cause the doing or performing of such act or thing.

46. Whenever the Christian or given names of any of the defendants herein are unknown to the grand jurors, said Christian or given names are indicated by initial letters.

**V. THE COMBINATION AND CONSPIRACY**

47. The grand jurors aforesaid, on their oaths aforesaid, do further present that beginning in the month of January 1935, and continuously thereafter up to and including the date of the presentment of this indictment, all of the defendants named herein, and other persons to the grand jurors unknown, well knowing all of the facts heretofore alleged in this indictment, unlawfully have combined and conspired together and engaged with one another to arbitrarily fix, maintain, and control artificial and noncompetitive prices to be paid to all producers by all distributors for all fluid milk produced on approved dairy farms located in the States of Illinois, Indiana, Michigan, and Wisconsin, and including all-fluid milk so produced and shipped from the States of Illinois, Indiana, Michigan, and Wisconsin into the said City of Chicago, as hereinbefore described. In so doing, the defendants have then and there engaged in an unlawful combination and conspiracy, in restraint of trade and commerce in said fluid milk among the said several states of the United States, in violation of Section 1 of the Act of Congress of July 2, 1890, entitled "An Act To protect trade and commerce against unlawful restraints and monopolies."

48. Said unlawful combination and conspiracy was intended to be effected, and has been effected, by divers means and methods including, among others, the following, that is to say:

49. Beginning in the month of January 1935, and thereafter at different times throughout the period of time covered by this indictment, the major distributors, the Pure Milk Association, and the Associated Milk Dealers, Inc., acting by, through and under the direction of, their respective officers, agents, and employees hereinbefore made defendants, and by and through others of their officers and agents and other persons to the grand jurors unknown, did, pursuant to a concerted plan and agreement, meet jointly at divers times and places in the City of Chicago, and did then and there fix, determine, and agree upon uniform terms and conditions for the purchase of all fluid milk purchased through the Pure Milk Association. The said uniform terms and conditions included, among others, the following (which are hereinafter referred to as "price provisions"):

- (i) Provision as to prices.
- (ii) Provision as to the basis for computing price.
- (iii) Provision as to the classification of milk for the purpose of pricing.
- (iv) Provision as to the quantity of milk to be purchased through Pure Milk Association.
- (v) Provision as to the time and place of delivery.
- (vi) Provision as to the time and terms of payment.

In fixing and agreeing upon the said price provisions, the said defendants intended that all fluid milk sold by Pure Milk Association to all independent distributors should be sold pursuant to and in accordance with the said price provisions. Said defendants further intended that all distributors of fluid milk in the City of Chicago should purchase fluid milk from independent producers in accordance with said price provisions.

50. Beginning in the month of March 1935, and thereafter at different times throughout the period covered by this indictment, each of the major distributors, acting in concert with all of the other major distributors, and pursuant to and in execution of the combination and conspiracy hereinbefore described, entered into individual agreements with the Pure Milk Association to purchase substantially all of its requirements of fluid milk from the Pure Milk Association. Each of the said agreements contained all of the price provisions determined and agreed upon by the defendants as described in paragraph 49 of this indictment. The said agreements provided, among other things, that if the Pure Milk Association sold or caused to be sold fluid milk to any distributor for a lower price than that provided for by the said price provisions, the major distributors would be entitled to purchase milk through the Pure Milk Association for the said lower price.

51. Beginning in the month of March 1935, and thereafter throughout the period covered by this indictment, each of the major distributors, acting in concert with all of the other major distributors, and pursuant to and in execution of the said combination and conspiracy, did purchase substantially all of its requirements of fluid milk from the Pure Milk Association pursuant to and in accordance with the price provisions. Throughout the said period of time, all fluid milk sold to all distributors by the Pure Milk Association in the City of Chicago, or for distribution therein, was sold pursuant to and in accordance with price provisions identical with those prescribed in the said agreements with the major distributors, and the Pure Milk Association refused to sell fluid milk to any distributor in the City of Chicago except pursuant to and in accordance with the price provisions contained in such written agreements and for prices fixed pursuant to such price provisions.

52. All fluid milk purchased by the major distributors from independent producers was purchased at prices based upon the price provisions contained in said agreements, and the major distributors refused to purchase any fluid milk from any independent producer except at prices based upon the price provisions fixed and determined as aforesaid.

53. The Pure Milk Association, during the period covered by this indictment, published and sent to all distributors purchasing fluid milk from or through said Association, monthly price letters quoting the prices to be paid to its members by distributors for fluid milk purchased by them, which said prices were computed in accordance with the artificial and noncompetitive price provisions fixed and determined as aforesaid. The Pure Milk Association also published and

sent a monthly periodical entitled "Pure Milk" to its member producers and others, and set forth in the said periodical the said artificial and noncompetitive prices, well knowing and intending that said artificial and noncompetitive prices would be relied upon and accepted by independent distributors and by them made the basis of prices to be paid by them to independent producers. The said artificial and non-competitive prices so set forth in the said price letters and in said periodical were so relied upon, accepted, and made the basis of prices to be paid by independent distributors to independent producers.

54. Each of the said agreements entered into by the Pure Milk Association with each of the major distributors and each of the independent distributors who purchased fluid milk from the Pure Milk Association provided, among other things, that in the event any dispute should arise between the parties with respect to any of the price provisions of the agreements or that any of the parties thereto should desire a change or modification of said price provisions, and if the parties could not settle such dispute or agree upon the desired changes within a stipulated period of time, the matter in dispute was to be submitted to arbitration.

55. In February 1937 a dispute arose between the Pure Milk Association and the major distributors with respect to the price provisions that were contained in and made a part of the agreements then in effect. Thereafter, an arbitration proceeding was held in which E. W. Tiedeman and the defendants W. A. Wentworth and Leland Spencer acted as arbitrators pursuant to the provisions for arbitration provided in the said agreements. In the arbitration proceeding before the arbitrators, the major distributors, acting as a unit through the agency of Associated Milk Dealers, Inc., and the Pure Milk Association participated actively therein. Notwithstanding the objections of E. W. Tiedeman, the defendants W. A. Wentworth and Leland Spencer, acting in concert with the other defendants and pursuant to and in execution of the combination and conspiracy hereinbefore alleged, did, on February 15, 1937, by an award so-called, fix and determine arbitrary and non-competitive price provisions to be effective thereafter with respect to fluid milk purchased by all distributors from or through the Pure Milk Association under the terms and conditions of the said agreements. The said arbitrary and non-competitive price provisions so fixed and determined by the said award were accepted by the Pure Milk Association and by the major distributors purchasing fluid milk from the Pure Milk Association, and prices for all fluid milk purchased by distributors from or through the Pure Milk Association were fixed on the basis of the said award until May 17, 1937.

56. In April 1937 another dispute arose between the Pure Milk Association and the said major distributors with respect to the price provisions that were contained in and made a part of the agreements then in effect. Thereafter, another arbitration proceeding was held in which E. W. Tiedeman and the defendants W. A. Wentworth and Leland Spencer again acted as arbitrators. In the said arbitra-

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tion proceeding, the major distributors, again acting as a unit through the agency of Associated Milk Dealers, Inc., and the Pure Milk Association participated actively therein. Notwithstanding the objections of E. W. Tiedeman, the defendants W. A. Wentworth and Leland Spencer, acting in concert with the other defendants and pursuant to and in execution of the combination and conspiracy hereinbefore alleged, did, on May 17, 1937, by an award so-called, fix and determine arbitrary and non-competitive price provisions to be effective thereafter with respect to fluid milk purchased by all distributors from or through the Pure Milk Association under the terms and conditions of the said agreements. The said arbitrary and non-competitive price provisions so fixed and determined by the said award were accepted by the Pure Milk Association and by the major distributors purchasing fluid milk from the Pure Milk Association, and thereafter until new agreements were made, the prices for all fluid milk purchased by all distributors from or through the Pure Milk Association were fixed on the basis of the said award.

57. The Bottle Exchange, acting in concert with the other defendants and pursuant to and in execution of the combination and conspiracy hereinbefore alleged, from time to time, throughout the period covered by this indictment, did:

(i) delay and refuse to return milk bottles and other milk containers to distributors who refused to purchase fluid milk at the prices fixed and determined as aforesaid;

(ii) refuse to sell its stock held in its treasury to independent distributors who refused to purchase fluid milk at the prices fixed and determined as aforesaid;

(iii) refuse to transfer on its records stock purchased by independent non-stockholder distributors from stockholders who were no longer engaged in the distribution of fluid milk; unless and until said independent non-stockholder distributors agreed to purchase fluid milk at the prices fixed and determined as aforesaid.

58. The defendant Local 753, acting in concert with the other defendants and pursuant to and in execution of the combination and conspiracy hereinbefore alleged, throughout the period covered by this indictment, did:

(i) prevent, hinder, restrain, and impede the transportation of fluid milk into the City of Chicago shipped to independent distributors who refused to purchase fluid milk at the prices fixed and determined as aforesaid;

(ii) prevent, hinder, restrain, and impede the distribution within the City of Chicago of fluid milk by independent distributors who refused to purchase fluid milk at the prices fixed and determined as aforesaid;

(iii) deny membership in Local 753 to duly qualified drivers in the employ of independent distributors who refused to purchase fluid milk at the prices fixed and determined as aforesaid.

Throughout the period covered by this indictment, Local 753 performed the acts and accomplished the purposes set forth in subparagraphs (i) to (iii) above, inclusive, by unlawful threats, intimidation, and acts of violence.

59. The defendant Leslie G. Goudie, acting in concert with the other defendants and pursuant to and in execution of the combination and conspiracy hereinbefore alleged, throughout the period covered by this indictment, did:

(i) counsel, advise and direct the defendant Local 753 and the officials and agents of Local 753 with respect to the acts described in paragraph 58 above;

(ii) through the instrumentality of the Joint Council of the International Brotherhood of Teamsters, Chauffeurs, Stablemen and Helpers of America, prevent the delivery of daily supplies of meat, bread, bakery products, vegetables, and other foods by members of unions affiliated with the said Joint Council to places of business served by the independent distributors who refused to purchase fluid milk at the prices fixed and determined as aforesaid.

60. The defendant Daniel A. Gilbert, acting in concert with the other defendants and pursuant to and in execution of the combination and conspiracy hereinbefore alleged, from time to time during the period covered by this indictment, did:

(i) select officers of various local teamsters' and chauffeurs' unions who composed the Joint Council;

(ii) counsel, advise and direct the said officials and the said defendant Local 753 with respect to the acts described in paragraph 58 above;

(iii) counsel and advise the defendant Leslie G. Goudie with respect to the acts described in paragraph 59 above;

(iv) protect the officials, agents, and members of Local 753 from arrest and prosecution for performing the acts mentioned in paragraph 58 above.

61. The defendants Herman N. Bundesen, Paul Krueger and William J. Guerin, in disregard of their lawful duties as officials and agents of the Board of Health of the City of Chicago, and acting in concert with the other defendants and pursuant to and in execution of the combination and conspiracy hereinbefore alleged, from time to time throughout the period covered by this indictment, did:

(i) give preferential treatment in the matter of the inspection and approval of dairy farms to member-producers, and to independent producers selling fluid milk to the major distributors at prices fixed and determined as aforesaid;

(ii) impose unwarranted, arbitrary, illegal, and unreasonable burdens on independent producers who refused to sell their fluid milk at the prices fixed and determined as aforesaid;

(iii) refuse to inspect dairy farms of independent producers who desired to sell fluid milk to independent distributors in the City of Chicago, but who refused to sell such fluid milk at prices fixed and

determined as aforesaid, notwithstanding the fact that, as was well known to the said defendants, the dairy farms of the said independent producers were located in close proximity to approved dairy farms.

#### VI. JURISDICTION AND VENUE

62. The combination and conspiracy hereinbefore alleged was designed and has operated and has been carried out, in part, within the Eastern Division of the Northern District of Illinois. The Pure Milk Association, acting in concert with the other defendants, and pursuant to and in execution of said combination and conspiracy, has contracted for and has sold to the major distributors and to independent distributors within said District, large quantities of fluid milk produced on approved dairy farms located in the States of Illinois, Indiana, Michigan, and Wisconsin at the artificial, arbitrary, and noncompetitive prices aforesaid. The major distributors within said District, acting in concert, with the other defendants, and pursuant to and in execution of said combination and conspiracy, have contracted to purchase and have purchased large quantities of fluid milk from member-producers and independent producers at the artificial, arbitrary, and noncompetitive prices aforesaid. The said fluid milk produced, sold, and purchased as aforesaid was transported and shipped by over-the-road motor vehicles and by railroad in interstate commerce into the City of Chicago within said District. That part of said fluid milk sold by the Pure Milk Association as aforesaid, and that part of the said fluid milk purchased by the defendant major distributors as aforesaid, which was produced on approved dairy farms located in the State of Illinois was sold and was purchased for the purpose of adding said fluid milk to an existing current of interstate trade and commerce in fluid milk with the intention that said fluid milk from the State of Illinois would become a part of the current of interstate commerce in fluid milk produced in states outside the State of Illinois. The activities of all the defendants herein have operated, and do operate, substantially and directly to restrain and burden the untrammeled shipment and movement of said fluid milk in interstate commerce into and within the City of Chicago, in said District.

And so the grand jurors aforesaid, upon their oaths aforesaid, do further present that the defendants named, at the time and place and in the manner and form aforesaid, unlawfully have combined and conspired to restrain trade and commerce in fluid milk among the several states of the United States, against the peace and dignity of the United States and contrary to the form of the statute of the United States in such case made and provided.

#### COUNT TWO

And the grand jurors aforesaid, inquiring as aforesaid, upon their oaths aforesaid, do hereby reaffirm, reallege and incorporate, as if herein set forth in full, each of the allegations set forth in paragraphs 1 to 46, inclusive, of Count One of this indictment.

**D. THE COMBINATION AND CONSPIRACY**

63. And the grand jurors aforesaid, upon their oaths aforesaid, do further present that beginning in the month of January 1935, and continuously thereafter up to and including the date of the presentation of this indictment, all the defendants named herein and other persons to the grand jurors unknown, well knowing all the facts heretofore alleged in this indictment, unlawfully have combined and conspired together and engaged with one another to fix and maintain by common and concerted action, uniform, arbitrary, and non-competitive prices for the sale by the distributors in the City of Chicago of fluid milk shipped into the said City from the States of Illinois, Indiana, Michigan, and Wisconsin. In so doing, the defendants have been and there engaged in an unlawful combination and conspiracy in restraint of trade and commerce in fluid milk among the said several states of the United States, in violation of Section 1 of the Act of Congress of July 2, 1890, entitled "An Act To protect trade and commerce against unlawful restraints and monopolies."

64. Said unlawful combination and conspiracy was intended to be effected and has been effected by divers means and methods, including, among others, the following, that is to say:

65. Beginning in the month of January 1935, and thereafter at different times throughout the period of time covered by this indictment, Associated Milk Dealers, Inc., Pure Milk Association, and the major distributors, acting by, through, and under the direction of their representatives, officers, agents, and employees, hereinbefore made defendants, and by and through others of their officers and agents, and other persons to the grand jurors unknown, did meet together and hold conferences at divers times and places in the City of Chicago and did then and there agree upon and fix uniform, arbitrary, and non-competitive prices to be exacted from and paid by purchasers of fluid milk sold in the City of Chicago. In agreeing upon and fixing the said uniform, arbitrary, and non-competitive prices, the said defendants intended to and did compel and cause independent distributors to exact the said uniform, arbitrary, and non-competitive prices from all persons who purchased fluid milk in the City of Chicago from independent distributors.

66. The major distributors, acting in concert with the other defendants and pursuant to and in execution of the combination and conspiracy hereinbefore alleged, throughout the period of time covered by this indictment, did:

- (i) observe and maintain the prices so fixed for fluid milk;
- (ii) sell and distribute all fluid milk which they sold in the City of Chicago at the said uniform, arbitrary, and non-competitive prices, and pursuant to the said combination and conspiracy;
- (iii) refuse to sell fluid milk to any purchaser in the City of Chicago except at the said uniform, arbitrary, and non-competitive prices.

67. The Associated Milk Dealers, Inc., acting in concert with the other defendants and pursuant to and in execution of the said com-

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bination and conspiracy hereinbefore alleged, from time to time, throughout the period covered by this indictment, did:

- (i) endeavor to procure independent distributors to sell fluid milk only at the said prices so fixed;
- (ii) inform independent distributors of the prices fixed as aforesaid;
- (iii) by and through the defendants Paul Potter and Otto Black, and other persons whose names are unknown to the grand jurors, persuade and coerce independent distributors not to sell fluid milk in the City of Chicago at prices lower than those fixed as aforesaid.

68. Throughout the period covered by this indictment, the Pure Milk Association, acting in concert with the other defendants and pursuant to and in execution of the said combination and conspiracy hereinbefore alleged, did refuse to sell or deliver fluid milk to distributors who would not agree to maintain and who did not maintain the said prices fixed as aforesaid.

69. The grand jurors aforesaid, inquiring as aforesaid, upon their oaths aforesaid, do hereby reaffirm, reallege, and incorporate, as if herein set forth in full, each of the allegations set forth in paragraphs 54 to 56, inclusive, of Count One of this indictment. The defendants, W. A. Wentworth and Leland Spencer, on February 15, 1937, and May 17, 1937, did fix and determine the arbitrary and non-competitive basis for computing the prices of all fluid milk purchased by distributors through the Pure Milk Association, as described in paragraphs 55 and 56 of Count One of this indictment, acting in concert with the other defendants and acting pursuant to and in execution of the combination and conspiracy hereinbefore alleged, well knowing and intending that the said basis so fixed and determined would likewise fix and determine the prices to be paid by all purchasers of fluid milk from distributors in the City of Chicago. The arbitrary and non-competitive basis for computing the prices of fluid milk purchased by distributors through the Pure Milk Association, fixed and determined by the arbitrators as described in paragraphs 55 and 56 of Count One of this indictment, did in fact fix and determine the prices paid by all persons who purchased fluid milk from distributors in the City of Chicago, which prices were arbitrary and noncompetitive.

70. The Bottle Exchange, acting in concert with the other defendants and pursuant to and in execution of the said combination and conspiracy, from time to time, throughout the period covered by this indictment, did:

- (i) delay and refuse to return milk bottles and other milk containers to distributors who refused to maintain the prices fixed as aforesaid;
- (ii) refuse to sell its stock held in its treasury to independent distributors who refused to maintain the prices for fluid milk fixed as aforesaid;
- (iii) refuse to transfer on its records stock purchased by independent non-stockholder distributors from stockholders who were no

longer engaged in the distribution of fluid milk, unless and until said independent non-stockholder distributors agreed to sell fluid milk at prices not lower than those fixed as aforesaid.

71. The defendant Local 753, acting in concert with the other defendants and pursuant to and in execution of the combination and conspiracy hereinbefore alleged, throughout the period covered by this indictment, did:

(i) prevent, hinder, restrain, and impede the transportation in interstate commerce of fluid milk to the City of Chicago for distribution by distributors who refused to maintain the prices for fluid milk fixed and determined as aforesaid;

(ii) prevent, hinder, restrain, and impede the distribution within the City of Chicago of fluid milk by distributors who refused to maintain the prices for fluid milk fixed and determined as aforesaid;

(iii) deny membership in Local 753 to duly qualified drivers in the employ of independent distributors who did not comply with and maintain the prices for fluid milk fixed as aforesaid;

(iv) compel independent distributors to sell fluid milk at the uniform, arbitrary, and non-competitive prices aforesaid. Throughout the period covered by this indictment, Local 753 performed the acts and accomplished the purposes set forth in sub-paragaphs (i) to (iv) above inclusive, by unlawful threats, intimidation, and acts of violence.

72. The defendant Leslie G. Goudie, acting in concert with the other defendants and pursuant to and in execution of the combination and conspiracy hereinbefore alleged, throughout the period covered by this indictment, did:

(i) counsel, advise, direct, and cause the defendant Local 753 and the officials and agents of Local 753 to perform the acts described in paragraph 71 above;

(ii) through the instrumentality of the Joint Council of the International Brotherhood of Teamsters, Chauffeurs, Stablemen and Helpers of America, prevent the daily deliveries of meat, bread, bakery products, vegetables, and other foods by members of unions affiliated with the said Joint Council to places of business served by independent distributors who did not agree to maintain and did not maintain the prices for fluid milk fixed as described above.

73. The defendant Daniel A. Gilbert, acting in concert with the other defendants and pursuant to and in execution of the combination and conspiracy hereinbefore alleged, from time to time during the period covered by this indictment, did:

(i) select officers of various local teamsters' and chauffeurs' unions who composed the Joint Council;

(ii) counsel, advise, direct, and cause the said officials and the Local 753 to perform the acts described in paragraph 71 above;

(iii) counsel and advise the defendant Leslie G. Goudie with respect to the acts described in paragraph 72 above;

(iv) protect the officials, agents, and members of Local 753 from arrest and prosecution for performing the acts mentioned in paragraph 71 above.

74. The defendants Herman N. Bundesen, Paul Krueger, and William J. Guérin, in disregard of their lawful duties as officials and agents of the Board of Health of the City of Chicago, and acting in concert with the other defendants and pursuant to and in execution of the combination and conspiracy hereinbefore alleged, from time to time throughout the period covered by this indictment, did:

- (i) give preferential treatment in the matter of the inspection and approval of dairy farms to producers selling their fluid milk to distributors who had agreed to maintain and who did maintain the arbitrary, artificial, and non-competitive prices fixed as aforesaid;
- (ii) impose unwarranted, arbitrary, illegal, and unreasonable burdens upon producers who sold fluid milk to distributors who did not agree to maintain and did not maintain the said prices fixed as aforesaid;
- (iii) impose unwarranted, arbitrary, illegal, and unreasonable burdens on distributors who refused to maintain the arbitrary, artificial, and non-competitive prices fixed as aforesaid and who sold fluid milk at prices lower than the said prices fixed as aforesaid.

## II. JURISDICTION AND VENUE

75. The combination and conspiracy hereinbefore alleged was designed and has operated and has been carried out, in part, within the Eastern Division of the Northern District of Illinois. During and throughout the period covered by this indictment, the major distributors, within said District, acting in concert with the other defendants, and pursuant to and in execution of said combination and conspiracy, have contracted to purchase, and have purchased, large quantities of fluid milk produced on approved dairy farms located in the States of Illinois, Indiana, Michigan, and Wisconsin from member-producers and independent producers; and have sold and distributed large quantities of said fluid milk in the City of Chicago within said District at the uniform, arbitrary and non-competitive prices fixed, maintained, and controlled as aforesaid. The activities of all the defendants herein have operated, and do operate, substantially and directly to restrain and burden the untrammeled shipment and movement of said fluid milk in interstate commerce into and within the City of Chicago, in said District.

And so the grand jurors aforesaid, upon their oaths aforesaid, do further present that the defendants named, at the time and place and in the manner and form aforesaid, unlawfully have combined and conspired to restrain trade and commerce in fluid milk among the several states of the United States, against the peace and dignity of the United States and contrary to the form of the statute of the United States in such case made and provided.

## COUNT THREE

And the grand jurors aforesaid, upon their oaths aforesaid, do hereby reaffirm, reallege, and incorporate, as if herein set forth in

full, each of the allegations set forth in paragraphs 1 to 46, inclusive, contained in Count One of this indictment.

#### I. THE COMBINATION AND CONSPIRACY

76. And the grand jurors aforesaid, inquiring as aforesaid, upon their oaths aforesaid, do further present that beginning in the month of January 1935, and continuously thereafter up to and including the date of the presentment of this indictment, all of the defendants named herein and other persons to the grand jurors unknown, well knowing all of the facts heretofore alleged in this indictment, unlawfully have combined and conspired together and engaged with one another to hinder and to prevent prospective independent distributors from engaging in the business of distributing fluid milk in the City of Chicago, to hinder and to prevent existing independent distributors from distributing fluid milk in the City of Chicago in competition with the major distributors, to hinder and to prevent the distribution of fluid milk to stores and by stores in the City of Chicago and to hinder and to prevent any distribution of fluid milk in the City of Chicago, except by the method and in the manner determined by said defendants. In so doing, the defendants have then and there engaged in an unlawful combination and conspiracy in restraint of trade and commerce in said fluid milk among the said several states of the United States, in violation of Section 1 of the Act of Congress of July 2, 1890, entitled "An Act To protect trade and commerce against unlawful restraints and monopolies."

77. Said unlawful combination and conspiracy was intended to be effected, and has been effected, by divers means and methods, including, among others, the following that is to say:

78. The major distributors, acting in concert with one another and with the other defendants, and pursuant to and in execution of the combination and conspiracy hereinbefore alleged, from time to time throughout the period covered by this indictment, did:

(i) agree to refrain and, in accordance with such agreement, refrained from competing with each other for customer accounts, which are hereinafter referred to as stops, the term by which such accounts are known in the fluid milk business in the City of Chicago;

(ii) refuse to serve any stop which any other distributor was serving unless allowed to serve such stop exclusively;

(iii) obtain, by means of cash payments, loans, gifts of merchandise, gifts or loans of equipment or fixtures, special discounts, special prices and other gratuities, the privilege of serving stops exclusively.

79. The Associated Milk Dealers, Inc., acting in concert with the other defendants, and pursuant to and in execution of the combination and conspiracy hereinbefore alleged, from time to time throughout the period covered by this indictment, did adopt and enforce a rule requiring independent distributors to refrain from taking stops of major distributors.

80. The Pure Milk Association, acting in concert with the other defendants, and pursuant to and in execution of the combination and conspiracy hereinbefore alleged, from time to time throughout the period covered by this indictment, did:

(i) refuse to sell fluid milk to independent distributors who attempted to take, or did take, stops of the defendant major distributors;

(ii) refuse to sell fluid milk to independent distributors who distributed fluid milk by a method and in a manner other than that determined by the said defendants;

(iii) subsidize and operate surreptitiously a bogus independent distributor.

81. The defendants W. A. Wentworth and Leland Spencer, on February 15, 1937, and May 17, 1937, acting in concert with the other defendants, and pursuant to and in execution of the combination and conspiracy hereinbefore alleged, well knowing and intending the consequences of their act, rendered an award so-called (which is described in paragraphs 55 and 56 of Count One of this indictment and each of the allegations of said paragraphs is hereby reaffirmed, realleged, and incorporated as if herein set forth in full).

82. The Milk Dealers Bottle Exchange, acting in concert with the other defendants, and pursuant to and in execution of the combination and conspiracy hereinbefore alleged, from time to time throughout the period covered by this indictment, did:

(i) delay the return of, and refuse to return, bottles of independent distributors;

(ii) refuse to sell to independent distributors stock of the Milk Dealers Bottle Exchange and to recognize sales of stock of the Milk Dealers Bottle Exchange made to independent distributors by owners of such stock.

83. Local 753, acting in concert with the other defendants, and pursuant to and in execution of the combination and conspiracy hereinbefore alleged, from time to time throughout the period covered by this indictment, did:

(i) compel and coerce prospective independent distributors to acquire the business of existing fluid milk distributors, as a condition precedent to entering into the business of distributing fluid milk in the City of Chicago;

(ii) compel and coerce independent distributors to observe certain unwritten rules with respect to the distribution of fluid milk, which rules required, among other things, that not more than one distributor should serve any one stop, and that no independent distributor should take stops away from major distributors;

(iii) refuse to enter into labor contracts with independent distributors except upon condition that said independent distributors observe the said unwritten rules referred to in subparagraph (ii) above;

(iv) compel and coerce proprietors of stores to refrain from distributing fluid milk at said stores in the City of Chicago;

(v) compel and coerce independent vendor distributors (that is to say, persons, firms, or corporations, who are distributors, but who do not operate a milk plant) to refrain from distributing fluid milk in the City of Chicago.

During the period covered by this indictment, Local 753 performed the acts and accomplished the purposes set forth in subparagraphs (i) to (v), inclusive, above, by threats, intimidation, violence, and by other unlawful acts, and more particularly, by:

- (a) picketing of stores distributing fluid milk;
- (b) engaging in secondary boycotts;
- (c) threatening to injure and injuring persons;
- (d) threatening to damage and destroy, and damaging and destroying, property;
- (e) attempting forcibly to detain, and forcibly detaining, employees of distributors;
- (f) threatening to call and calling strikes of employees of distributors.

84. The defendant Leslie G. Goudie, acting in concert with all of the defendants, and pursuant to and in execution of the combination and conspiracy hereinbefore alleged, from time to time throughout the period covered by this indictment, did:

(i) counsel, advise, direct, and cause the defendant Local 753, and the officials and agents of Local 753, to perform the acts described in paragraph 83;

(ii) prevent, through the instrumentality of the Joint Council of the International Brotherhood of Teamsters, Chauffeurs, Stablemen, and Helpers of America, the daily deliveries of meat, bread, bakery products, vegetables, and other foods by members of unions affiliated with said Joint Council to stores being served by independent distributors and vendor distributors.

85. The defendant, Daniel A. Gilbert, acting in concert with the other defendants, and pursuant to and in execution of the combination and conspiracy hereinbefore alleged, from time to time during the period covered by this indictment, did:

(i) select the officials of various local teamsters' and chauffeurs' unions who composed the Joint Council;

(ii) counsel, advise, direct, and cause the said officials and said Local 753 to perform the acts described in paragraph 83 above;

(iii) counsel and advise the defendant, Leslie G. Goudie, with respect to the acts described in paragraph 84 above;

(iv) protect the officials, agents, and members of Local 753 from arrest and prosecution for performing acts mentioned in paragraph 83 above.

86. The defendants, Herman N. Bundesen, Paul Krueger, and William J. Guerin, in disregard of their lawful duties as officials and agents of the Board of Health of the City of Chicago, and acting in concert with the other defendants and pursuant to and in execution of the combination and conspiracy hereinbefore alleged, from time to time during the period covered by this indictment, did:

- (i) refuse, upon arbitrary and capricious grounds not within the scope of the authority conferred upon the said defendants by the ordinances of the City of Chicago and the rules and regulations promulgated thereunder, to grant permits to prospective distributors;
- (ii) require that independent distributors purchase and install new and expensive equipment and fixtures, construct new buildings and alter old buildings, which requirements were not within the scope of the authority conferred upon them by the ordinances of the City of Chicago and the rules and regulations promulgated thereunder;
- (iii) close, arbitrarily, and capriciously, and without notice and an opportunity for hearing, the plants of independent distributors for minor or feigned charges of infraction of the ordinances of the City of Chicago and the rules and regulations promulgated thereunder;
- (iv) harass and annoy, continually, independent distributors by minor or feigned charges of infraction of the ordinances of the City of Chicago and the rules and regulations promulgated thereunder;
- (v) refuse to inspect the farms of independent producers intending to supply fluid milk to independent distributors;
- (vi) cancel and revoke, arbitrarily, capriciously, and without notice and opportunity for hearing, upon minor or feigned charges of infraction of the ordinances of the City of Chicago, or of the rules and regulations promulgated thereunder, the permits of producers to ship milk into the City of Chicago.

## II. JURISDICTION AND VENUE

87. The combination and conspiracy hereinbefore alleged was designed and has operated and has been carried out, in part, within the Eastern Division of the Northern District of Illinois. During and throughout the period covered by this indictment, the major distributors, within said District, acting in concert with the other defendants, and pursuant to and in execution of said combination and conspiracy, have transported into the City of Chicago, within said District, and there distributed, large quantities of fluid milk produced on approved dairy farms located in the States of Illinois, Indiana, Michigan, and Wisconsin. All of the said defendants, acting in concert with one another and pursuant to and in execution of the said combination and conspiracy, have hindered and prevented prospective independent distributors from engaging in the business of distributing fluid milk in the City of Chicago, and have hindered and prevented existing independent distributors from distributing fluid milk in the City of Chicago in competition with the major distributors, and have hindered and prevented the distribution of fluid milk to stores and by stores in the City of Chicago, and have hindered and prevented any distribution of fluid milk in the City of Chicago, except by the method and in the manner determined by the said de-

fendants. The activities of the defendants herein have operated and do operate, substantially and directly, to restrain and burden the untrammeled shipment and movement of said fluid milk in interstate commerce into and within the City of Chicago, in the said District.

And so the grand jurors aforesaid, upon their oaths aforesaid, do further present that the defendants named, at the time and place and in the manner and form aforesaid, unlawfully have combined and conspired to restrain trade and commerce in fluid milk among the several states of the United States, against the peace and dignity of the United States and contrary to the form of the statute of the United States in such case made and provided.

#### COUNT FOUR

And the grand jurors aforesaid, inquiring as aforesaid, upon their oaths aforesaid, do hereby reaffirm, reallege, and incorporate, as if herein set forth in full, all of the allegations set forth in paragraphs 1 to 46, inclusive, of Count One of this indictment.

##### I. THE COMBINATION AND CONSPIRACY

88. And the grand jurors aforesaid, upon their oaths aforesaid, do further present that beginning in the month of January 1935, and continuously thereafter up to and including the date of the presentation of this indictment, all of the defendants named herein, and other persons to the grand jurors unknown, well knowing all of the facts heretofore alleged in this indictment, unlawfully have combined and conspired together and engaged with one another and with divers other persons to restrict, limit, and control and to restrain and obstruct the supply of fluid milk moving in the channels of interstate commerce into the City of Chicago from the States of Illinois, Indiana, Michigan, and Wisconsin. In so doing, said defendants have then and there engaged in an unlawful combination and conspiracy in restraint of trade and commerce in fluid milk among the several states of the United States in violation of Section 1 of the Act of Congress approved July 2, 1890, entitled "An Act To protect trade and commerce against unlawful restraints and monopolies."

89. The said unlawful combination and conspiracy was intended to be effected and has been effected by divers means and methods, including among others the following that is to say:

90. The Pure Milk Association, acting in concert with the other defendants and pursuant to and in execution of the combination and conspiracy hereinbefore alleged, from time to time, throughout the period covered by this indictment, did:

(i) enforce a base-surplus plan of production, so-called, with respect to all member-producers who had been members since 1929, and made it a condition precedent before any new producers were admitted as member-producers that they accept the base-surplus plan;

- (ii) limit, through the base-surplus plan, the total production of fluid milk of member-producers by:
- (a) assigning arbitrarily to each member-producer a production quota, known as a base;
  - (b) requiring each member-producer to ship exclusively his total fluid milk production to a designated distributor;
  - (c) adjusting periodically the aggregate bases of member-producers so as to conform to the total fluid milk sales of the distributors to whom the member-producers were allocated;
  - (d) establishing a method of classification of fluid milk produced by its member-producers into two arbitrary classes for the purpose of determining payment, namely, (1) fluid milk produced by a member-producer up to the amount of his base, called base milk, and (2) milk produced by a member-producer in excess of his base, called surplus milk or excess deliveries; and
  - (e) providing that the member-producers should receive a substantially lower price for surplus milk or excess deliveries than base milk, notwithstanding the fact that the surplus milk was of the same grade and quality as the base milk, thus diminishing initiative and the economic incentive of member-producers to produce on approved dairy farms and to offer for sale in the City of Chicago any fluid milk in excess of the amount prescribed as their base by the Pure Milk Association and the major distributors;
- (iii) adjust and regulate its membership arbitrarily;
- (iv) coerce and compel, by threats and intimidation, member-producers, dissatisfied with the base-surplus plan, to refrain from withdrawing from the Pure Milk Association;
- (v) prevent, hinder, restrain, and delay, by threats, intimidation, and destruction of property, the transportation and delivery of fluid milk to the City of Chicago to independent distributors, which was purchased from independent producers, thereby limiting the amount of fluid milk available to supply the fluid-milk requirements of the people of the City of Chicago.

91. The major distributors, acting in concert with the other defendants and pursuant to and in execution of the combination and conspiracy hereinbefore alleged, from time to time throughout the period covered by this indictment, did:

- (i) enter into agreements with the Pure Milk Association to purchase substantially all of their requirements of fluid milk for their sales in the City of Chicago from the Pure Milk Association (said agreements being more fully described in paragraphs 49 to 54, inclusive, of Count One; each of the allegations set forth in said paragraphs 49 to 54, inclusive, of Count One of this indictment, being hereby reaffirmed, realleged, and incorporated as if herein set forth in full);
- (ii) agree to pay member-producers in accordance with the base-surplus plan described as aforesaid;
- (iii) participate in the establishment and determination of the bases of member-producers whereby the aggregate bases of the mem-

ber-producers shipping to major distributors were adjusted so that the said aggregate bases were made to conform to the total fluid milk sales of distributors;

(iv) assist the Pure Milk Association in coercing and compelling, by divers threats and means, independent producers to join the Pure Milk Association so as to place under control the production of fluid milk of the said independent producers;

(v) coerce and compel, by divers threats and means, member-producers, dissatisfied with the base-surplus plan, to refrain from withdrawing from the Pure Milk Association.

92. The defendants W. A. Wentworth and Leland Spencer, on February 15, 1937, and May 17, 1937, acting in concert with the other defendants and pursuant to and in execution of the combination and conspiracy hereinbefore alleged, rendered an award so-called (as described in paragraphs 55 and 56 of Count One of this indictment; each of the allegations of said paragraphs being hereby reaffirmed, realleged, and incorporated as if herein set forth in full) and did then and there fix and determine a substantially lower price for surplus milk than that fixed and determined for base milk. The effect of said award was to limit, control, and restrict the supply of fluid milk flowing through the channels of interstate commerce and entering the City of Chicago, all of which was well known and intended by the said defendants in rendering said award.

93. The Associated Milk Dealers, Inc., acting in concert with the other defendants and pursuant to and in execution of the said combination and conspiracy hereinbefore alleged, from time to time throughout the period covered by this indictment, did:

(i) participate in the establishment and determination of the bases of member-producers whereby the aggregate bases of the member-producers, shipping to major distributors, were adjusted so that the said aggregate bases were made to conform to the total fluid milk sales of the major distributors;

(ii) assist the Pure Milk Association in coercing and compelling, by divers threats and means, independent producers to join the Pure Milk Association so as to place under control the production of fluid milk of the said independent producers;

(iii) coerce and compel, by divers threats and means, member-producers, dissatisfied with the base-surplus plan, to refrain from withdrawing from the Pure Milk Association.

94. The Bottle Exchange, acting in concert with the other defendants and pursuant to and in execution of the said combination and conspiracy, from time to time throughout the period covered by this indictment, did:

(i) delay and refuse to return milk bottles and other milk containers to independent distributors who attempted to induce member-producers to withdraw from and refuse to sell their milk through the Pure Milk Association;

(ii) refuse to sell its stock held in its treasury to independent distributors who attempted to induce member-producers to withdraw

from and refuse to sell their milk through the Pure Milk Association;

(iii) refuse to transfer on its records stock purchased by independent nonstockholder distributors from stockholders who were no longer engaged in the distribution of fluid milk, unless and until said nonstockholder independent distributors refrained from inducing member-producers to withdraw from and refuse to sell their milk through the Pure Milk Association.

95. Local 753, acting in concert with the other defendants and pursuant to and in execution of the combination and conspiracy hereinbefore alleged, from time to time throughout the period covered by this indictment, did:

(i) resort to threats, acts of violence or other coercive means directed or exerted against independent distributors who attempted to induce member-producers to withdraw from and refuse to sell their milk through the Pure Milk Association;

(ii) deny membership in Local 753 to duly qualified drivers in the employ of independent distributors who attempted to induce member-producers to withdraw from and refuse to sell their milk through the Pure Milk Association;

(iii) prevent, hinder, restrain, and delay the transportation and delivery of fluid milk into the City of Chicago to independent distributors, which was purchased from independent producers, thereby limiting the amount of fluid milk available to supply the fluid milk requirements of the people of the City of Chicago.

Local 753 performed the acts and accomplished the practices set forth in sub-paragraphs (i) to (iii) above, inclusive, by unlawful threats, intimidation, and acts of violence.

96. The defendant Leslie G. Goudie, acting in concert with the other defendants and pursuant to and in execution of the combination and conspiracy hereinbefore alleged, throughout the period covered by this indictment, did:

(i) counsel, advise, and direct the defendant Local 753 and the officials and agents of Local 753 with respect to the acts described in paragraph 95 above;

(ii) prevent, through the instrumentality of the Joint Council of the International Brotherhood of Teamsters, Chauffeurs, Stablemen and Helpers of America, the delivery of daily supplies of meat, bread, bakery products, vegetables, and other foods by members of unions affiliated with the said Joint Council to places of business served by the independent distributors who did not agree to take their milk through the Pure Milk Association.

97. The defendant Daniel A. Gilbert, acting in concert with the other defendants and pursuant to and in execution of the combination and conspiracy hereinbefore alleged, from time to time during the period covered by this indictment, did:

(i) select officers of various local teamsters' and chauffeurs' unions who composed the Joint Council;

- (ii) counsel, advise, and direct the said officials and the defendant Local 753 with respect to the acts described in paragraph 95 above;
- (iii) counsel and advise the defendant Leslie G. Goudie, with respect to the acts described in paragraph 96 above;
- (iv) protect the officials and agents and members of Local 753 from arrest and prosecution for performing the acts mentioned in paragraph 95 above.

98. The defendants Herman N. Bundesen, Paul Krueger, and William J. Guerin, in disregard of their lawful duties as officials and agents of the Board of Health of the City of Chicago, and acting in concert with the other defendants, and pursuant to and in execution of the combination and conspiracy hereinbefore alleged, from time to time throughout the period covered by this indictment, did:

- (i) give preferential treatment in the matter of inspection and approval of dairy farms of member-producers;
- (ii) impose unwarranted, arbitrary, illegal, and unreasonable burdens upon independent producers;
- (iii) refuse to inspect dairy farms of independent producers, notwithstanding, as was well known to the defendants, the farms of the said independent producers were located in close proximity to other approved dairy farms.

## II. JURISDICTION AND VENUE

99. The combination and conspiracy hereinbefore alleged was designed and has operated and has been carried out, in part, within the Eastern Division of the Northern District of Illinois. During and throughout the period covered by this indictment, the Pure Milk Association and the major distributors, acting in concert with the other defendants, and pursuant to and in execution of said combination and conspiracy, have contracted to buy and to sell and have bought and sold within said District, large quantities of fluid milk produced on approved dairy farms located in the States of Illinois, Indiana, Michigan, and Wisconsin in accordance with the base-surface plus plan of production and payment aforesaid. The said base-surface plus plan of payment was intended to and does restrict, limit, and control, restrain and obstruct the supply of fluid milk entering the City of Chicago, by arbitrarily limiting the quantity of fluid milk for which a member-producer may be paid the base price, as aforesaid. The activities of all the defendants herein have operated, and do operate, substantially and directly to restrain and burden the untrammeled shipment and movement of said fluid milk in interstate commerce into and within the City of Chicago, in said District.

And so the grand jurors aforesaid, upon their oaths aforesaid, do further present that the defendants named, at the time and place and in the manner and form aforesaid, unlawfully have combined and conspired to restrain trade and commerce in fluid milk in the several states of the United States, against the peace and dignity of the

United States and contrary to the form of the statute of the United States in such case made and provided.

MICHAEL L. IGOE,  
United States Attorney.

[No. 31197. United States District Court, Northern District of Illinois, Eastern Division. The United States of America vs. The Borden Company et al. Indictment. Vio: Sec. 1, Act of Congress, July 2, 1890: "An Act To Protect Trade and Commerce Against Unlawful Restraints and Monopolies." A true bill, E. J. Lambe, Foreman. Filed in open Court this 1st day of November, A. D. 1938. Henry W. Freeman, Clerk.]

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In United States District Court

[Title omitted.]

*Demurrer of defendant Daniel A. Gilbert*

Filed January 6, 1939

Now comes the defendant, Daniel A. Gilbert, by Thomas Dodd Healy, his attorney, and having read the indictment herein says that said indictment and each count thereof, and the matters therein contained, in manner and form as the same are therein alleged and set forth, are insufficient in law to require this defendant to plead to said indictment or any count thereof, or to answer the same, and that said indictment, and each count thereof, are insufficient in law to sustain a judgment against this defendant; and, without intending to waive any other substantial causes of demurrer by the enumeration of the following specific causes, demurs to said indictment and each count thereof and moves to quash the same upon the following grounds:

1. Said indictment, and each count thereof, does not aver or set forth any facts or allege or charge the commission of any acts by the defendant constituting an offense against the United States of America.
2. Said indictment, and each count thereof, in purporting to allege an offense against the United States of America, fails to do so with the certainty required by law, but on the contrary are vague, indefinite, and uncertain to such an extent that this defendant is not advised thereby of the nature of the charges against him, so that he may properly prepare and submit his defense.
3. Section 1 of the Act of Congress of July 2, 1890, entitled, "An Act to Protect Trade and Commerce Against Unlawful Restraints and Monopolies," has been so amended, altered, modified, and restricted by the Act of Congress of February 18, 1922, entitled, "An Act to Authorize Association of Producers of Agricultural Products," as to deny to this defendant due process of law and equal protection of the laws in contravention of the Fifth Amendment of the Constitution of the United States of America, that is to say,

(a) Said Act of July 2, 1890, as amended, altered, modified, and restricted, as aforesaid, arbitrarily and unreasonably discriminates between certain producers and associations of producers of agricultural products and other persons, including this defendant, and 20 other associations, with respect to the definition, prohibition, and punishment of monopolies and restraints of trade in interstate trade and commerce.

(b) Said Act of July 2, 1890, so modified, amended, qualified, and restricted, as aforesaid, arbitrarily and unreasonably discriminates between certain producers and associations of producers of agricultural products and all other persons, including this defendant, and other associations, by legalizing certain monopolies and restraints of interstate trade and commerce by such producers which are forbidden if intended or accomplished by others.

4. The indictment is void in that it was returned, without authority of law, at the October Term of this Court in the year 1938, by a Grand Jury impaneled and sworn at the July Term of said Court in the year 1938 and illegally sitting during said October Term, that is to say,

(a) The orders of August 31, 1938, and September 27, 1938, authorizing the Grand Jury to sit, respectively, during the September and October 1938 terms of the District Court, do not find or disclose that this indictment was the result of an investigation begun but not finished during said July Term, or that any investigation was begun but not finished during said July 1938 Term of this Court.

(b) The indictment does not show that the investigations 21 alleged to have been begun but not finished during the July 1938 Term were not completed in the September 1938 Term.

5. None of the counts of said indictment states facts showing that this defendant has engaged in an unlawful combination or conspiracy in restraint of trade or commerce among the several states of the United States, that is to say,

(a) The first paragraph of each count, which undertakes to describe the supposed combination and conspiracy therein alleged, does not state facts showing that the matters and things therein complained of are or were an undue or unreasonable restraint of interstate trade and commerce.

(b) The means by which said supposed combinations and conspiracies were intended to be effected are not stated in said indictment or in any count thereof.

(c) It does not appear from the allegations of said counts or of any of them that the objects or purposes of said supposed combinations and conspiracies or of any of them were intended to be accomplished by any means which would effect an undue or unreasonable restraint of interstate trade or commerce.

(6) The allegations of Count Three of said indictment are insufficient to give this Court jurisdiction over the matters and things therein set forth, and wholly fail to state an offense against the United States of America, that is to say,

22 (a) It is not shown by the allegations of said count that the alleged acts of the defendant, therein complained of, restrain or restrained interstate trade or commerce.

(b) It does not appear that the business of distributing fluid milk in the City of Chicago, alleged to have been hindered and prevented, involved interstate trade and commerce.

7. The allegations of Count Four of said indictment do not show that this defendant has engaged in an unlawful combination or conspiracy in restraint of trade or commerce among the several states of the United States; that is to say—

(a) It appears from said allegations that the object and effect of the said supposed combination and conspiracy therein alleged was, the adoption of the base-surplus plan, and it does not appear that the base-surplus plan is or was an unlawful or unreasonable restraint of trade or commerce.

(b) It appears from the allegations of the indictment that the alleged restraint and control complained of in Count Four was and is restraint and control of production and not restraint or control of the commerce among the several states.

(c) It does not appear by the allegations of said count that the base-surplus plan limits or restrains either the production of milk or trade and commerce in milk.

23 8. This defendant shows the Court that the allegations of the indictment, and of each count thereof, are insufficient to show that this defendant has engaged in an unlawful combination or conspiracy in restraint of trade or commerce among the several states of the United States, in that it appears by said allegations that said defendant was not engaged in commerce or trade in the milk industry or in any branch thereof, and was in fact fully and lawfully performing the duties of his office as Chief Investigator for the State's attorney of Cook County, Illinois.

9. Because certain defects are specified herein, it is not intended that any defects, omissions, or imperfections are waived, and the same are hereby insisted upon with like effect as if the same were herein specifically set forth and enumerated.

Wherefore, this defendant prays judgment that this demurrer be sustained as to him; that said indictment, and each count thereof, be quashed, and that he be dismissed and discharged of this indictment by the Court.

DANIEL A. GILBERT,

By (Signed) THOMAS DODD HEALY,

His Attorney.

THOMAS DODD HEALY.

## In United States District Court

[Title omitted.]

*Notice*

To Messrs. WILLIAM J. CAMPBELL, *United States Attorney*,  
LEO F. TIERNEY, *Special Assistant Attorney General*.

Please take notice that we have this day filed in the above entitled cause the joint and several demurrer and motion to quash of the defendants, Bowman Dairy Company, D. B. Peck, Francis H. Kullman, Jr., M. J. Metzger, H. T. Adamson, and J. F. Philippi, the said demurrer and motion to quash containing certain specifications of the grounds upon which we shall rely in the presentation thereof; a copy of which said demurrer and motion to quash is handed you herewith.

LOUIS E. HART,  
IRVING HERRIOTT,  
L. EDWARD HART, JR.,  
*Attorneys for said Defendants.*

Dated at Chicago, Illinois, January 7, 1939.

Received a copy of the foregoing notice and of the demurrer and motion to quash therein referred to this 7th day of January 1939.

LEO F. TIERNEY,  
By D. B. BRITT.  
WM. J. CAMPBELL.

## In United States District Court

[Title omitted.]

*Joint and several demurrer of Defendants Bowman Dairy Company, D. B. Peck, Francis H. Kullman, Jr., M. J. Metzger, H. T. Adamson, and J. F. Philippi, and of each of them, to the indictment herein, and motion of said defendants and each of them to quash said indictment.*

Filed January 7, 1939

Now come the defendants Bowman Dairy Company, D. B. Peck, Francis H. Kullman, Jr., M. J. Metzger, H. T. Adamson, and J. F. Philippi, and each of them, by Louis E. Hart, Irving Herriott, and L. Edward Hart, Jr., their attorneys, and having read the indictment herein say that the said indictment and each count thereof, and the matters therein contained in manner and form as the same are therein alleged and set forth, are not sufficient in law to require these defendants, or any or either of them, to plead to said indictment or any count thereof, or to answer the same, and that said indictment and each count thereof is not sufficient in law to warrant the rendition of any legal judgment thereon. And without intending to waive

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any other substantial causes of demurrer by the enumeration of the following specific causes, demur to said indictment and each count thereof and move to quash the same upon the following grounds:

1. Said indictment and each count thereof does not aver or set forth any facts or allege or charge the commission of any acts by these defendants, or any or either of them, constituting an offense against the United States of America.

27. 2. Said indictment and each count thereof, in purporting to allege an offense against the United States of America, fails to do so with the certainty required by law, but, on the contrary, is vague, indefinite, and uncertain to such an extent that these defendants and each of them is not advised thereby of the nature of the charges against them, and each of them, so that they and each of them may properly prepare and submit their several defenses.

3. Section 1 of the Act of Congress of July 2, 1890, entitled "An Act to Protect Trade and Commerce Against Unlawful Restraints and Monopolies," has been so amended, altered, limited, modified, and restricted by various Acts of Congress including, among others, the Act of Congress of February 18, 1922, entitled "An Act to Authorize Association of Producers of Agricultural Products," as to deny to defendants due process of law and equal protection of the laws in contravention of the Fifth Amendment of the Constitution of the United States, that is to say:

(a) Said Act of July 2, 1890, as amended, altered, modified, and restricted, as aforesaid, arbitrarily and unreasonably discriminates between certain producers and associations of producers of agricultural products and other persons, including these defendants, and other associations, with respect to the definition, prohibition, and punishment of monopolies and restraints of trade in interstate trade and commerce.

(b) The said Act of Congress of July 2, 1890, has been so modified, amended, qualified, and restricted, as aforesaid, that it creates an arbitrary and unreasonable discrimination between certain producers of agricultural products and all other persons, including these

28. defendants, by legalizing certain monopolies and restraint of trade by certain producers of agricultural products which would otherwise be forbidden under Section 1 of the said Act of Congress of July 2, 1890, if intended or accomplished by others than such producers of agricultural products.

4. The indictment is void in that it was returned without authority of law at a term of this court which was not the term at which the Grand Jury which returned the indictment was convened, for the following reasons:

(a) Neither the order of July 31, 1938, nor the order of September 27, 1938, entered by this court, each of which purports to authorize the Grand Jury to sit beyond the July 1938 term of this court, contains findings of fact to the effect that there was any unfinished investigation begun by said Grand Jury at the July 1938 term of

this court which would warrant this court in permitting said Grand Jury to continue to sit beyond said July 1938 term thereof, in accordance with the provisions of Section 284 of the Act of Congress of March 3, 1911, entitled "An Act to Codify, Revise, and Amend the Laws Relating to Judiciary" as amended (U. S. Code Annotated, Title 28, Section 421).

(b) That the orders of August 31, 1938, and of September 27, 1938,<sup>o</sup> were entered several days prior to the termination of the August 1938 and of the September 1938 terms, respectively, of this court in violation of Section 284 of the Act of Congress of March 3, 1911, entitled "An Act to Codify, Revise, and Amend the Laws Relating to Judiciary" as amended (U. S. Code Annotated, Title 28, Section 421).

(c) The indictment fails to disclose that any investigation begun by the Grand Jury in the July 1938 term of this court was not completed prior to the October 1938 term.

29 (d) This court had no authority to authorize said Grand Jury to sit during the October 1938 term of this court on its request because by order entered on August 31, 1938, this court had attempted to authorize said Grand Jury to sit during the September 1938 term of this court.

5. Each of the four counts of the said indictment fails to allege facts sufficient to show an unlawful combination and conspiracy or means to render said alleged combination and conspiracy unlawful under Section 1 of the Act of Congress dated July 2, 1890 entitled "An Act to Protect Trade and Commerce Against Unlawful Restraint and Monopolies."

6. Each and every count of the indictment is duplicitous in that there are alleged in each count thereof separate distinct and unrelated offenses against the United States of America.

7. Count 2 of said indictment fails to state facts sufficient to constitute a crime against the United States under Section 1 of an Act of Congress dated July 2, 1890 entitled "An Act to Protect Trade and Commerce Against Unlawful Restraints and Monopolies," in that:

(a) It appears in the said count that the prices paid by the consumers of fluid milk in the City of Chicago were fixed and determined as the result of a lawful act of others than these defendants entirely independent of the alleged conspiracy so to fix said prices complained of in said count.

(b) The said count contains allegations repugnant one to the other, certain of which allegations are entirely consistent with the innocence of these defendants of the alleged crime sought to be charged in said count.

30 (c) It affirmatively appears from the allegations of said count that interstate trade or commerce, if any, in fluid milk had ceased and terminated prior to the alleged performance of the matters and things complained of in said count.

8. Count 3 of the indictment does not state facts sufficient to constitute a crime against the United States under Section 1 of An Act of Congress dated July 2, 1890 entitled "An Act to Protect Trade and Commerce Against Unlawful Restraints and Monopolies," in that:

(a) The count fails to set forth facts sufficient to show that the defendants combined and conspired to restrain trade or commerce among the several states.

(b) The count fails to set forth facts to show that the distribution of fluid milk by so-called independent distributors, or the distribution of milk to stores and by stores in the City of Chicago, constitute trade or commerce among the several states.

9. Count 4 of the indictment fails to state facts sufficient to constitute a crime against the United States under Section 1 of An Act of Congress dated July 2, 1890 entitled "An Act to Protect Trade and Commerce Against Unlawful Restraints and Monopolies," in that:

(a) The count fails to allege facts to demonstrate an unreasonable or direct restraint of trade or commerce among the several states.

(b) The count fails to allege means of accomplishing said combination which would render the same unlawful.

(c) The count alleges a restraint of the production of, rather than trade or commerce among the several states in, fluid milk.

(d) The count fails to allege facts to demonstrate any restraint of trade or commerce among the several states.

(e) The count fails to sufficiently define the means,  
31 i. e., the base surplus plan, alleged to have been adopted by  
the defendants for the purpose of restraining trade or commerce among the several states.

10. Because certain defects in said indictment are specified herein, it is not intended that any defects, omissions, or imperfections are waived, and the same are hereby insisted upon with like effect as if the same were herein specifically set forth and enumerated.

Wherefore, the defendants, Bowman Dairy Company, D. B. Peck, Francis H. Kullman, Jr., M. J. Metzger, H. T. Adamson, and J. F. Philippi, and each of them, demands judgment dismissing and quashing the indictment and/or each and every count thereof, and discharging them and each of them from custody.

Yours, etc.,

Bowman Dairy Company; D. B. Peck; Francis H. Kullman, Jr.; M. J. Metzger; H. T. Adamson; J. F. Philippi; by (signed) Montgomery, Hart, Pritchard, & Herriott, Attorneys for said Defendants, 120 South LaSalle Street, Chicago, Illinois. (Signed) Louis E. Hart, (signed) Irving Herriott, (signed) L. Edward Hart, Jr., Attorneys for said Defendants.

To Messrs. WILLIAM J. CAMPBELL, *United States Attorney,*  
*LEO F. TIRNEY, Special Assistant Attorney General.*

32 In United States District Court

[Title omitted.]

*Joint and several demurrer of the defendants, The Borden Company, H. W. Comfort, S. M. Ross, Charles L. Dressel, Harry M. Reser, W. A. Baril, O. O. Smaha, R. W. Nessler, F. A. Webb, and W. A. Wentworth, to the indictment and motion of said defendants, and each of them, to quash said indictment*

Filed January 7, 1939

Now come the defendants, The Borden Company, H. W. Comfort, S. M. Ross, Charles L. Dressel, Harry M. Reser, W. A. Baril, O. O. Smaha, R. W. Nessler, F. A. Webb, and W. A. Wentworth, and also come each of said defendants severally, by Frederic Burnham, Donald F. McPherson, and Cecil I. Crouse, their attorneys, and having read the indictment herein say that said indictment and each count thereof, and the matters therein contained, in manner and form as the same are therein alleged and set forth, are insufficient in law to require these defendants, or any or either of them, to plead to said indictment or any count thereof, or to answer the same, and that said indictment, and each count thereof, are insufficient in law to sustain a judgment against these defendants or any of them; and, without intending to waive any other substantial causes of demurrer by the enumeration of the following specific causes, demur to said 33 indictment and each count thereof and move to quash the same upon the following grounds:

1. Said indictment, and each count thereof, do not aver or set forth any facts or allege or charge the commission of any acts by the defendants, or any or either of them, constituting an offense against the United States of America.
2. Said indictment, and each count thereof, in purporting to allege an offense against the United States of America, fail to do so with the certainty required by law, but on the contrary are vague, indefinite and uncertain to such an extent that these defendants, and each of them, are not advised thereby of the nature of the charges against them, and each of them, so that they, and each of them, may properly prepare and submit their several defenses.
3. Section 1 of the Act of Congress of July 2, 1890, entitled, "An Act to Protect Trade and Commerce Against Unlawful Restraints and Monopolies," has been so amended, altered, modified, and restricted by various acts of Congress, including, among others, the Act of Congress of February 18, 1922, entitled, "An Act to Authorize Association of Producers of Agricultural Products," as to deny to defendants due process of law and equal protection of the laws in contravention of the Fifth Amendment of the Constitution of the United States of America, that is to say,

38 UNITED STATES VS. THE BORDEN COMPANY ET AL.

(a) Said Act of July 2, 1890, as amended, altered, modified, and restricted, as aforesaid, arbitrarily and unreasonably discriminates between certain producers and associations of producers of agricultural products and other persons, including these defendants, and other associations, with respect to the definition, prohibition, and punishment of monopolies and restraints of trade in interstate trade and commerce.

(b) Said Act of July 2, 1890, so modified, amended, qualified, and restricted, as aforesaid, arbitrarily and unreasonably discriminates between certain producers and associations of producers of agricultural products and all other persons, including these defendants, and other associations, by legalizing certain monopolies and restraints of interstate trade and commerce by such producers which are forbidden if intended or accomplished by others.

4. The indictment is void in that it was found and returned, without authority of law, at the October Term of this Court in the year 1938, by a Grand Jury impaneled and sworn at the July Term of said Court in the year 1938 and illegally sitting during said October Term, that is to say,

(a) The orders of August 31, 1938, and September 27, 1938, authorizing the Grand Jury to sit, respectively, during the September and October 1938 Terms of the District Court, do not find or disclose

35 that this indictment was the result of an investigation begun but not finished during said July Term, or that any investigation was begun but not finished during said July 1938 Term of this Court.

(b) The indictment does not show that the investigations alleged have been begun but not finished during the July 1938 Term were not completed in the September 1938 Term.

(c) It does not appear from said orders of August 31, 1938, and September 27, 1938, that said July 1938 Grand Jury was continued during the September 1938 and October 1938 Terms solely to finish investigations begun but not finished by it, and therefore said orders are void.

(d) Said Grand Jury had no power to request that it be continued during a term beyond the September 1938 Term of this Court, and the order of September 27, 1938, purporting to continue said Grand Jury during the October 1938 Term on its request is void, since it appears from the records that an order had been previously entered on August 31, 1938, continuing said Grand Jury on its request during the September 1938 Term.

5. None of the counts of said indictment states facts showing that these defendants or any or either of them have engaged in an unlawful combination or conspiracy in restraint of trade or commerce among the several states of the United States, that is to say:

(a) The first paragraph of each count, which undertakes to 36 describe the supposed combination and conspiracy therein alleged, does not state facts showing that the matters and things therein complained of are or were an undue or unreasonable restraint of interstate trade and commerce.

(b) The means by which said supposed combinations and conspiracies were intended to be effected are not stated in said indictment or in any count thereof.

(c) It does not appear from the allegations of said counts or of any of them that the objects or purposes of said supposed combinations and conspiracies or of any of them were intended to be accomplished by any means which would effect an undue or unreasonable restraint of interstate trade or commerce.

6. Each count of the indictment is fatally duplicitous in that each count joins several separate, independent, disconnected and unrelated alleged conspiracies.

7. The allegations of Count Two of said indictment do not show that these defendants, or any of them, have engaged in an unlawful combination or conspiracy in restraint of trade or commerce among the several states of the United States, that is to say:

(a) It affirmatively appears from the allegations of said count that interstate trade or commerce, if any, in fluid milk had ceased and terminated prior to the alleged performance of the matters and things complained of in said count.

37 (b) It is not shown by the allegations of said Count that the alleged acts of these defendants therein complained of, restrain or restrained interstate commerce.

(c) It appears by the allegations of said count that the prices paid by consumers of fluid milk in the City of Chicago were fixed and determined by and as the result of the lawful acts of others than these defendants, and entirely independent of the alleged conspiracy to fix said prices complained of in said count.

8. The allegations of Count Three of said indictment are insufficient to give this Court jurisdiction over the matters and things therein set forth, and wholly fail to state an offense against the United States of America, that is to say:

(a) It is not shown by the allegations of said count that the alleged acts of the defendants, therein complained of, restrain or restrained interstate trade or commerce.

(b) It does not appear that the business of distributing fluid milk in the City of Chicago, alleged to have been hindered and prevented, involved interstate trade and commerce.

9. The allegations of Count Four of said indictment do not show that these defendants or any of them have engaged in an unlawful combination or conspiracy in restraint of trade or commerce among the several states of the United States, that is to say:

38 (a) It appears from said allegations that the object and effect of the said supposed combination and conspiracy therein alleged was the adoption of the base-surplus plan, and it does not appear that the base-surplus plan is or was an unlawful or unreasonable restraint of trade or commerce.

(b) It appears from the allegations of the indictment that the alleged restraint and control complained of in Count Four was and

is restraint and control of production and not restraint or control of the commerce among the several states.

(c) It does not appear by the allegations of said count that the base-surplus plan limits or restrains either the production of milk or trade and commerce in milk.

10. For a separate ground of demurrer of the defendant, W. A. Wentworth, said defendant shows the Court that the allegations of the indictment, and of each count thereof, are insufficient to show that this defendant has engaged in an unlawful combination or conspiracy in restraint of trade or commerce among the several states of the United States, in that it appears by said allegations that said defendant did nothing other than to arbitrate, with other arbitrators, certain disputes concerning the price provisions of contracts legally entered into between the Pure Milk Association and certain distributors of fluid milk.

39 11. Because certain defects are specified herein, it is not intended that any defects, omissions, or imperfections are waived, and the same are hereby insisted upon with like effect as if the same were herein specifically set forth and enumerated.

Wherefore, the defendants, and each of them, pray judgment that this demurrer be sustained as to them, and each of them; that said indictment, and each count thereof, be quashed and that they, and each of them, be dismissed and discharge of this indictment by the Court.

The Borden Company, H. W. Comfort, S. M. Ross, Charles L. Dressel, Harry M. Reser, W. A. Baril, O. O. Smaha, R. W. Nessler, F. A. Webb, and W. A. Wentworth, Defendants; by (signed) Frederic Burnham, (signed) Donald F. McPherson, (signed) Cecil I. Crouse, Their Attorneys. Sidley, McPherson, Austin & Burgess, Mayer, Meyer, Austrian & Platt.

40 In United States' District Court

[Title omitted.]

*Motion to quash service of summons upon a purported corporation, Borden-Wieland, Inc., named as a defendant herein*

Filed January 7, 1939

R. W. Nessler, the person upon whom, as purported Assistant Secretary of a purported corporation, Borden-Wieland, Inc., named as a defendant herein, service of summons herein was purportedly made, comes now, specially appearing in this behalf, by Frederic Burnham, Donald F. McPherson, and Cecil I. Crouse, who appear specially as his attorneys in this behalf, and suggests to the Court that said purported corporation, Borden-Wieland, Inc., named as a defendant herein, no longer has any corporate existence and has had no corporate existence since January 4, 1936; and said R. W. Nessler moves

the Court to quash the service of summons purportedly made upon him as such purported Assistant Secretary of said purported corporation, Borden-Wieland, Inc., and to dismiss or drop from the case said purported defendant, Borden-Wieland, Inc.; and in support of said motion presents herewith and attaches hereto his affidavit.

R. W. NESSLER,  
*Appearing Specially Herein.*  
By FREDERIC BURNHAM,  
DONALD F. MCPHERSON,  
CECIL I. CROUSE,  
*Specially Appearing in This Behalf.*

41

*Affidavit*

STATE OF ILLINOIS,  
*County of Cook, ss:*

R. W. Nessler, being first duly sworn on oath, deposes and says that although he is one of the defendants in the above-entitled cause, he is not now appearing in that capacity but is appearing specially in connection with the motion to which this affidavit is attached; that there was at one time a corporation known as Borden-Wieland, Inc., which said corporation was organized and existing under and by virtue of the laws of the State of Delaware; that he is informed and believes, and so states the fact to be, that on, to wit, January 4, 1936, said corporation, Borden-Wieland, Inc., together with other corporations, was merged into a corporation known as Borden's Dairy Products Company, Inc., and thus lost its corporate identity; that thereafter, all of the assets of said Borden's Dairy Products Company, Inc., were transferred to The Borden Company, a corporation organized and existing under and by virtue of the laws of the State of New Jersey; that thereafter on, to wit, February 11, 1936, the aforesaid Borden's Dairy Products Company, Inc., was dissolved, thus the corporation with which Borden-Wieland, Inc., had become merged, as aforesaid, lost its corporate identity; that since the aforesaid transfer of said assets of Borden's Dairy Products Company, Inc., to The Borden Company, The Borden Company has used the name "Borden-Wieland" as a name indicating one of the divisions of The Borden Company, but that there is no longer in existence any such corporation as Borden-Wieland, Inc.

Affiant further states that on, to wit, the 26th day of November, 1938, he was served with a summons as purported Assistant Secretary of Borden-Wieland, Inc.; that during the corporate existence of said Borden-Wieland, Inc., he was Assistant Secretary of said then Corporation, but that upon its merger, as aforesaid, his official connection with said Company ceased ipso facto.

Further affiant saith not.

R. W. NESSLER.

Subscribed and sworn to before me this 12th day of December 1938.  
[SEAL]

ELIZABETH M. RICHARDSON,  
*Notary Public.*

42 In United States District Court

[Title omitted.]

*Notice*

To:

WILLIAM J. CAMPBELL,

*United States District Attorney,**8th Floor, United States Court House, Chicago.*

LEO F. TIERNEY,

*Special Assistant to the Attorney General,**Room 667, 208 South La Salle Street, Chicago.*

Please take notice that we are this day filing in the office of the Clerk of the District Court of the United States the motion to quash and demurrer of Hunding Dairy Company, a corporation, and Carl W. Hunding, defendants in the above-entitled cause, a copy of which is herewith served upon you.

(Signed) CHARLES S. DENEEN,

(Signed) ROY MASSENA,

(Signed) DONALD N. SCHAFER,

*Attorneys for said Defendants.*

Received a copy of the above Notice and a copy of the document therein referred to this 7th day of January A. D. 1939.

(Signed) LEO F. TIERNEY. (D. &amp; B.)

(Signed) WILLIAM J. CAMPBELL.

In United States District Court

[Title omitted.]

*Motion of the Defendants Hunding Dairy Company, a corporation, and Carl W. Hunding, to quash the indictment herein, and demurrer of said defendants thereto.*

Filed January 7, 1939

Now come the Hunding Dairy Company, a corporation, and Carl W. Hunding, two of the defendants herein, by Charles S. Deneen, Roy Massena, and Donald N. Schaffer, their attorneys, and jointly and severally move the Court to quash the indictment, and each and every count thereof, for the following reasons:

(1) A. The indictment is void in that it was returned at the October term of this Court, in the year 1938, by a Grand Jury impanelled and sworn at the July term of said court in the year 1938, and which said Grand Jury was sitting without authority of law during said October term, that is to say:

(a) Neither the order of September 27, 1938, purporting to authorize said Grand Jury to continue to sit, upon its own request, during the October term of said court, nor the indictment shows

that the investigation of the matters charged in this indictment had not been finished prior to the commencement of said October term, in the year 1938, of this Court;

44 (b) The orders of August 31, 1938, and September 27, 1938, purporting to authorize said Grand Jury to continue to sit respectively during the September and October 1938 terms of this Court, do not set forth or disclose that an investigation of the matters charged in this indictment was begun but not finished during said July term or that any investigation was begun but not finished during either said July term or said September term, in the year 1938, of this Court;

(c) There was no warrant or authority in law for the entry of an order authorizing said Grand Jury upon its own request to continue to sit during the October term, in the year 1938, of this Court, said Grand Jury having upon its own request been authorized to continue to sit during the September term, in the year 1938, of this Court.

(2) B. The indictment, and each count thereof, is insufficient in law to constitute an offense against the laws of the United States, and does not show that these defendants, or either of them, conspired or combined to restrain trade or commerce among the several states of the United States, that is to say:

(a) The matters and things therein alleged to constitute an unlawful conspiracy beginning in the month of January 1935 were lawful under the laws of the United States as administered by the Executive, as more fully appears from a certain "License for Milk—Chicago Sales Area," issued under date of February 3, 1934, by the Secretary of Agriculture of the United States, acting under the authority in him vested by the Act of Congress, approved May 12, 1933, entitled "Agricultural Adjustment Act," and, which said license, as amended from time to time thereafter, was in full force and effect until March 2, 1935.

And said defendants further say that the indictment herein, and each and every count thereof, is not sufficient in law to require these defendants, or either of them, to plead thereto, and these defendants jointly and severally demur to the indictment, and each and every count thereof, for the following reasons:

1. Said indictment, and each count thereof, does not aver or set forth facts sufficient to constitute an offense against the laws of the United States.

2. Said indictment, and each count thereof, in purporting to allege an offense against the laws of the United States is not sufficiently definite or certain as fully to inform these defendants, and each of them, as to the nature and cause of the accusations against them, but said indictment, and each of the counts thereof, is vague, indefinite, and uncertain to the extent that these defendants, and each of them, are not advised thereby of the charges against them, and each of them, so as to enable them to prepare their several defenses thereto.

3. The indictment, and each count thereof, does not state facts showing that these defendants, and each of them, have engaged in an unlawful combination or conspiracy in restraint of trade or commerce among the several states of the United States, that is to say:

46. (a) The respective paragraphs of each count of said indictment which undertake to describe the supposed combination and conspiracy therein alleged do not state facts showing that the matters and things therein complained of are or were or constituted an undue or unreasonable restraint of trade or commerce among the several states of the United States;

(b) That the allegations of said counts, and each of them, as to the means and methods by which said supposed combinations or conspiracies were intended to be effected, do not set forth facts showing that any of such means would effect an undue or unreasonable restraint of trade or commerce among the several states of the United States.

4. Count Two of said indictment is insufficient and wholly fails to state facts sufficient to constitute an offense against the laws of the United States, that is to say:

(a) Said count fails to set forth facts showing the alleged acts of the defendants therein complained of were in restraint of trade and commerce among the several states of the United States;

(b) Said count does not set forth facts showing that the distribution of fluid milk in the City of Chicago involved trade or commerce among the several states of the United States.

5. Count Three of said indictment is insufficient and wholly fails to state facts sufficient to constitute an offense under the laws of the United States, that is to say:

47. (a) Said count fails to set forth facts showing that the alleged acts of the defendants therein complained of were in restraint of trade and commerce among the several states of the United States;

(b) Said count does not set forth facts showing that the distribution of fluid milk in the City of Chicago therein alleged to have been hindered or prevented involved trade or commerce among the several states of the United States.

6. Count Four of said indictment is insufficient and wholly fails to state facts sufficient to constitute an offense under the laws of the United States, that is to say:

(a) The allegations of said Count Four set forth that the supposed conspiracy and combination therein alleged was intended to be effected by the adoption of the base-surplus plan of payment, but said count fails to set forth facts showing that said base-surplus plan of production or payment is or was an unreasonable restraint of trade or commerce among the several states of the United States or in what manner said base-surplus plan was unlawful;

(b) Said Count Four sets forth facts showing that the supposed restraint and obstruction therein alleged was a restraint, if any, of

production and not a restraint of trade or commerce among the several states of the United States;

(c) The allegations of said Count Four do not set forth facts from which the Court can determine that the base-surplus plan restricts, limits, restrains, or obstructs either the production of milk or trade and commerce in fluid milk among the several states of the United States.

48 7. Said indictment, and each count thereof, purporting to charge an offense under Section 1 of the Act of Congress approved July 2, 1890, entitled "An Act to Protect trade and commerce against unlawful restraints and monopolies" is void for the reason that said Act of July 2, 1890, has been so amended, altered, and modified by the Act of Congress approved February 18, 1922, entitled "An Act to Authorize Association of Producers of Agricultural Products" as to deny to these defendants due process of law in contravention of the Fifth Amendment of the Constitution of the United States and of other constitutional rights in that,

(a) Said Act of July 2, 1890, as amended, altered, and modified by said Act of February 18, 1922, arbitrarily, unfairly, and capriciously discriminates between certain producers and associations of producers of agricultural products and other persons, including these defendants, and other associations, with respect to the legality of combinations and agreements and the prohibition and punishment therefor of monopolies and restraints of trade and commerce among the several states of the United States;

(b) Said Act of February 18, 1922, legalizes certain combinations and agreements in restraint of trade and commerce among the several states of the United States and tending to effect a monopoly thereof when made by certain producers and associations of producers of agricultural products, which said combinations and agreements are prohibited and punished if attempted or undertaken by other persons.

49 8. Because certain defects are specified herein, it is not intended that any defects, omissions, or imperfections are waived, and the same are insisted upon with like effect as if the same were herein specifically set forth.

Wherefore, these defendants, and each of them, pray judgment that this motion be sustained and that said indictment, and each count thereof, be quashed, and that these defendants, and each of them, be dismissed and discharged.

HUNDING DAIRY COMPANY,  
*A Corporation,*  
CARL W. HUNDING,  
*Defendants.*

By (Signed) CHARLES S. DENEEN,  
(Signed) ROY MASSENA,  
(Signed) DONALD N. SCHAFER,  
*Their Attorneys.*

[Title omitted.]

*Notice*

To WILLIAM J. CAMPBELL, Esq.,  
*United States Attorney.*

LEO F. TIERNEY, Esq.,  
*Special Assistant to the Attorney General.*

Please take notice that I am this day, January 7, 1939, filing with the Clerk of the United States District Court the motion of defendants Capitol Dairy Company and Hyman I. Freed to quash the indictment herein, and the demurrer of said defendants to said indictment, a copy of which said motion and demurrer is herewith handed you.

(Stamped) ISIDORE FRIED,  
*Attorney for Defendants,*  
*Capitol Dairy Company and Hyman I. Freed.*

Received copy of the foregoing notice, together with copy of motion and demurrer therein mentioned, January 7, 1939.

(Signed) LEO F. TIERNEY.  
(D. B. BRITT).

(Signed) WILLIAM J. CAMPBELL.

[Title omitted.]

*Motion of Defendants Capitol Dairy Company and Hyman I. Freed, and each of them, to quash the indictment herein, and demurrer of said defendants to said indictment*

Filed January 7, 1939

Now come the defendants, Capitol Dairy Company and Hyman I. Freed, and each of them, by Isidore Fried, their attorney, and jointly and severally move the Court to quash the indictment herein, and each and every count thereof, for the following reasons:

I

The indictment herein is void because it was returned during the October 1938 term of this Court by an illegal and invalid grand jury, which said grand jury then had no power to find or return said indictment, that is to say:

(a) Said grand jury was empaneled during the July 1938 term of this Court and had no power to find or return this indictment during the October 1938 term of this Court.

(b) Said grand jury had no power to continue to sit during the October 1938 term of this Court on its request, and the order of September 27, 1938, purporting to continue said grand jury during the October 1938 term on its request is void, it appearing from 52 the records that an order had been previously entered on August 31, 1938, continuing said grand jury during the September 1938 term on its request.

(c) It does not appear from the order of August 31, 1938, purporting to continue said July 1938 grand jury during the September 1938 term that the investigation which resulted in this indictment was one of the investigations begun but not finished during the July 1938 term of this Court, nor does it appear from the order of September 27, 1938, purporting to continue said July 1938 grand jury during the October 1938 term, nor from the indictment herein, that the investigation which resulted in this indictment was one of the investigations begun and not already finished by said grand jury.

(d) It does not appear from said orders of August 31, 1938, and September 27, 1938, that said July 1938 grand jury was continued during the September 1938 and October 1938 terms solely to finish investigations begun but not finished by it, and therefore said orders are void.

## II

And said defendants further say that said indictment and each count thereof and the matters therein contained are insufficient in law to require these defendants or either of them to plead to said indictment or any count thereof, or to answer the same, and that said indictment and each count thereof are insufficient in law to warrant the rendition of a judgment against these defendants or, 53 either of them, and these defendants demur to said indictment and each count thereof and move to quash the same upon the following grounds:

1. Said indictment, and each count thereof, does not aver or set forth any facts or allege or charge the commission of any acts by the defendants, or either of them, constituting an offense against the United States of America.

2. Said indictment, and each count thereof, in purporting to allege an offense against the United States of America, fails to do so with the certainty required by law, but on the contrary is vague, indefinite and uncertain to such an extent that these defendants, and each of them, are not advised thereby of the nature of the charges against them, and each of them, so that they, and each of them, may properly prepare and submit their several defenses.

3. Said indictment and each count thereof is void for the reason that Section 1 of the Act of Congress of July 2, 1890, entitled "An Act to Protect Trade and Commerce Against Unlawful Restraints and Monopolies," has been so amended, altered, modified, and re-

stricted by various Acts of Congress, including, among others, the Act of Congress of February 18, 1922, entitled "An Act to Authorize Association of Producers of Agricultural Products," as to deny to defendants due process of law and equal protection of the laws in contravention of the Fifth Amendment of the Constitution of the United States of America, in that—

(a) Said Act of July 2, 1899, as amended, altered, modified, and restricted by said Act of February 18, 1922, arbitrarily and unreasonably discriminates between certain producers and associations of producers of agricultural products and other persons, including these defendants, and other associations, with respect to the definition, prohibition, and punishment of monopolies and restraints of trade in interstate trade and commerce.

54 (b) Said Act of July 2, 1890, as modified, amended; qualified, and restricted by said Act of February 18, 1922, unreasonably discriminates between certain producers and associations of producers of agricultural products and all other persons; including these defendants, and other associations, by legalizing certain monopolies and restraints of interstate trade and commerce by such producers which are forbidden if intended or accomplished by others.

4. None of the counts of said indictment state facts showing that these defendants or any or either of them have engaged in an unlawful combination or conspiracy in restraint of trade or commerce among the several states of the United States, that is to say—

(a) The first paragraph of each count, which undertakes to describe the supposed combination and conspiracy therein alleged, does not state facts showing that the matters and things therein complained of are or were an undue or unreasonable restraint of interstate trade and commerce.

(b) The means by which said supposed combinations and conspiracies were intended to be effected are not stated in said indictment or in any count thereof.

(c) It does not appear from the allegations of said counts or any of them that the objects or purposes of said supposed combinations and conspiracies or of any of them were intended to be accomplished by any means which would effect an undue or unreasonable restraint of interstate trade or commerce.

55 5. The indictment and each count thereof is not sufficient in law to constitute an offense against the laws of the United States and does not show that these defendants combined and conspired to restrain trade or commerce among the several states of the United States, that is to say,

(a) The matters and things therein alleged to constitute a conspiracy in restraint of trade and commerce among the several states of the United States beginning in the month of January 1935, were lawful under the laws of the United States as more fully appears from a certain "License for Milk—Chicago Sales Area" issued by the Secretary of Agriculture of the United States acting under the

authority in him vested by the Act of Congress approved May 12, 1933, entitled "Agricultural Adjustment Act," which said license was issued by said Secretary of Agriculture under date of February 3, 1934, and, as amended from time to time thereafter, was in full force and effect until March 2, 1935.

6. The allegations of Count Two of said indictment are insufficient to give this Court jurisdiction over the matters and things therein set forth, and wholly fail to state an offense against the United States of America, that is to say,

(a) Said count fails to show that the matters and things therein complained of are or were a restraint of interstate trade and commerce or an undue or unreasonable restraint of interstate trade and commerce.

(b) Said count fails to show that the distribution of fluid milk in the City of Chicago involved trade or commerce among the several states of the United States.

7. The allegations of Count Three of said indictment are not sufficient to give this Court jurisdiction over the matters and things therein set forth, and wholly fail to state an offense against the United States of America, that is to say,

(a) The allegations of said count do not show that the alleged acts of the defendants, therein complained of, were in restraint of interstate trade or commerce.

(b) The allegations of said count fail to show that the distribution of fluid milk in the City of Chicago, alleged to have been hindered and prevented, involved interstate trade and commerce.

8. Count Four of said indictment is insufficient and fails to show that these defendants or any of them have engaged in an unlawful combination or conspiracy in restraint of trade or commerce among the several states of the United States, that is to say,

(a) It appears from said allegations that the object and effect of the said supposed combination and conspiracy therein alleged was intended to be effected by the adoption of the base-surplus plan, but it does not appear that the base-surplus plan is or was an unlawful or unreasonable restraint of trade or commerce.

(b) It appears from said allegations that the alleged restraint and control complained of was and is restraint and control of production and not restraint or control of trade or commerce among the several states.

(c) It does not appear from said allegations that the base-surplus plan complained of limits or restrains either the production of milk or trade and commerce in milk.

9. Because certain defects are specified herein, it is not intended that any defects, omissions, or imperfections are waived, and the same are hereby insisted upon with like effect as if the same were herein specifically set forth and enumerated.

Wherefore, said defendants and each of them pray that this demurrer be sustained as to them, and each of them; that said indict-

ment and each count thereof be quashed and that they and each of them be dismissed and discharged of this indictment by the Court.

CAPITOL DAIRY COMPANY,  
HYMAN I. FREED,

*Defendants.*

(Stamped) ISIDORE FRIED,

*By their attorney.*

(Stamped) ISIDORE FRIED,

*Attorney for said Defendants.*

58

In United States District Court

[Title omitted.]

*Demurrer to indictment of defendant International Dairy Company,  
a corporation*

Filed January 7, 1939

The defendant, International Dairy Company, a corporation, by Loy N. McIntosh, David B. Gann, Frederick Secord, and J. Walter Stead, its attorneys, comes and demurs to the said indictment and each count thereof, and says that the same is not sufficient in law for it to plead unto, for the following reasons:

1. The indictment, and each count thereof, fails to state facts showing the commission of any offense over which this court has jurisdiction.

2. The indictment, and each count thereof, fails to state facts showing an unlawful combination and conspiracy in restraint of trade and commerce in fluid milk among the said several states of the United States, in violation of section 1 of the Act of Congress of July 2, 1890, entitled "An act to protect trade and commerce against unlawful restraints and monopolies."

3. The alleged conspiracy set forth in each count of the indictment does not show facts sufficient to bring it within the purview of any statute of the United States of America.

59 4. The alleged conspiracy set forth in the indictment and each count thereof, relates to matters entirely within the jurisdiction of the laws of the State of Illinois and not within the inhibition of any laws of the United States.

5. The alleged conspiracy set forth in the indictment and each count thereof, relates to a subject matter that is not justiciable but is removed from the criminal jurisdiction of this court in that the Congress of the United States, in its plenary power as the legislative department of the federal government, has legislated to remove the subject matter of each count from the purview of section 1 of the Sherman Act and to devolve upon the executive department of the federal government power to regulate said subject matter by administrative action.

6. The indictment, and each count thereof, in setting forth said alleged conspiracy, shows by the application of the doctrine of judicial notice that the alleged conspiracy in each count set forth expired and ended on March 2, 1935, and that the subject matter set forth as constituting the alleged conspiracy so terminated on March 2, 1935, was in fact commanded to be done by the United States of America.

7. The indictment, and each count thereof, is fatally defective in that there is no showing of fact as to the membership or relation of this defendant to the other co-defendants named therein to connect it with the alleged conspiracy.

8. The indictment, and each count thereof, is fatally duplicitous.

9. The indictment, in each count thereof, joins several separate, independent, disconnected, unrelated, and subordinate alleged  
60 conspiracies.

10. There is a misjoinder of counts.

11. The indictment, and each count thereof, is vague, indefinite, uncertain, ambiguous; and the allegations are not direct, certain, and positive, but are set up by way of conclusions, argumentative inferences and epithets.

12. The allegations of the indictment, and each count thereof, are inconsistent with and repugnant to each other.

13. The allegations of the indictment, and each count thereof, are so vague, indefinite, and uncertain as to fail to apprise this defendant of the nature of the charge against it.

14. The indictment, and each count thereof, is barred by the statute of limitations.

15. By the presentation of specific objections, this defendant does not intend to waive the general objections herein contained, or any other objections not herein enumerated, to any count or counts of said indictment.

(Signed) LOY N. MCINTOSH,  
(Signed) DAVID H. GANN,  
(Signed) FREDERICK SECORD,  
(Signed) J. WALTER STEAD,  
*Attorneys for said defendant.*

61

In United States District Court

[Title omitted.]

*Demurrer to indictment of defendant, Gordon B. Wanzer*

Filed January 7, 1939

The defendant, Gordon B. Wanzer, by Loy N. McIntosh, David B. Gann, Frederick Secord, and J. Walter Stead, his attorneys, comes and demurs to the said indictment and each count thereof, and says that the same is not sufficient in law for him to plead unto, for the following reasons:

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- 1: The indictment, and each count thereof, fails to state facts showing the commission of any offense over which this court has jurisdiction.
2. The indictment, and each count thereof, fails to state facts showing an unlawful combination and conspiracy in restraint of trade and commerce in fluid milk among the said several states of the United States, in violation of section 1 of the Act of Congress of July 2, 1890, entitled "An act to protect trade and commerce against unlawful restraints and monopolies."
3. The alleged conspiracy set forth in each count of the indictment does not show facts sufficient to bring it within the purview of an statute of the United States of America.
- 62 4. The alleged conspiracy set forth in the indictment and each count thereof, relates to matters entirely within the jurisdiction of the laws of the State of Illinois and not within the inhibition of any laws of the United States.
5. The alleged conspiracy set forth in the indictment and each count thereof, relates to a subject matter that is not justiciable but is removed from the criminal jurisdiction of this court in that the Congress of the United States, in its plenary power as the legislative department of the federal government, has legislated to remove the subject matter of each count from the purview of section 1 of the Sherman Act and to devolve upon the executive department of the federal government power to regulate said subject matter by administrative action.
6. The indictment, and each count thereof, in setting forth said alleged conspiracy, shows by the application of the doctrine of judicial notice that the alleged conspiracy in each count set forth expired and ended on March 2, 1935, and that the subject matter set forth as constituting the alleged conspiracy so terminated on March 2, 1935, was in fact commanded to be done by the United States of America.
7. The indictment, and each count thereof, is fatally defective in that there is no showing of fact as to the membership or relation of this defendant to the other codefendants named therein to connect him with the alleged conspiracy.
8. The indictment, and each count thereof, is fatally duplicitous.
9. The indictment, in each count thereof, joins several separate, independent, disconnected, unrelated, and subordinate alleged 63 conspiracies.
10. There is a misjoinder of counts.
11. The indictment, and each count thereof, is vague, indefinite, uncertain, ambiguous; and the allegations are not direct, certain, and positive, but are set up by way of conclusions, argumentative inferences, and epithets.
12. The allegations of the indictment, and each count thereof, are inconsistent with and repugnant to each other.

13. The allegations of the indictment, and each count thereof, are so vague, indefinite, and uncertain as to fail to apprise this defendant of the nature of the charge against him.

14. The indictment, and each count thereof, is barred by the statute of limitations.

15. By the presentation of specific objections, this defendant does not intend to waive the general objections herein contained, or any other objections not herein enumerated, to any count or counts of said indictment.

LOY N. McINTOSH,  
DAVID B. GANN,  
FREDERICK SECORD,  
J. WALTER STEAD,  
*Attorneys for said defendant.*

64 In United States District Court

[Title omitted.]

*Demurrer to indictment of defendant H. Stanley Wanzer*

Filed January 7, 1939

The defendant, H. Stanley Wanzer, by Loy N. McIntosh, David B. Gann, Frederick Secord, and J. Walter Stead, his attorneys, comes and demurs to the said indictment and each count thereof, and says that the same is not sufficient in law for him to plead unto, for the following reasons:

1. The indictment, and each count thereof, fails to state facts showing the commission of any offense over which this court has jurisdiction.

2. The indictment, and each count thereof, fails to state facts showing an unlawful combination and conspiracy in restraint of trade and commerce in fluid milk among the said several states of the United States, in violation of section 1 of the Act of Congress of July 2, 1890, entitled "An act to protect trade and commerce against unlawful restraints and monopolies."

3. The alleged conspiracy set forth in each count of the indictment does not show facts sufficient to bring it within the purview of any statute of the United States of America.

65. 4. The alleged conspiracy set forth in the indictment and each count thereof, relates to matters entirely within the jurisdiction of the laws of the State of Illinois and not within the inhibition of any laws of the United States.

5. The alleged conspiracy set forth in the indictment and each count thereof, relates to a subject matter that is not justiciable but is removed from the criminal jurisdiction of this court in that the

Congress of the United States, in its plenary power as the legislative department of the federal government, has legislated to remove the subject matter of each count from the purview of section 1 of the Sherman Act and to devolve upon the executive department of the federal government power to regulate said subject matter by administrative action.

6. The indictment, and each count thereof, in setting forth said alleged conspiracy, shows by the application of the doctrine of judicial notice that the alleged conspiracy in each count set forth expired and ended on March 2, 1935, and that the subject matter set forth as constituting the alleged conspiracy so terminated on March 2, 1935, was in fact commanded to be done by the United States of America.

7. The indictment, and each count thereof, is fatally defective in that there is no showing of fact as to the membership or relation of this defendant to the other co-defendants named therein to connect him with the alleged conspiracy.

8. The indictment, and each count thereof, is fatally duplicitous.

9. The indictment, in each count thereof, joins several  
66 separate, independent, disconnected, unrelated, and subordinate  
alleged conspiracies.

10. There is a misjoinder of counts.

11. The indictment, and each count thereof, is vague, indefinite, uncertain, ambiguous; and the allegations are not direct, certain, and positive, but are set up by way of conclusions, argumentative inferences, and epithets.

12. The allegations of the indictment, and each count thereof, are inconsistent with and repugnant to each other.

13. The allegations of the indictment, and each count thereof, are so vague, indefinite, and uncertain as to fail to apprise this defendant of the nature of the charge against him.

14. The indictment, and each count thereof, is barred by the statute of limitations.

15. By the presentation of specific objections, this defendant does not intend to waive the general objections herein contained, or any other objections not herein enumerated, to any count or counts of said indictment.

LOY N. MCINTOSH,  
DAVID B. GANN,  
FREDERICK SECORD,  
J. WALTER STEAD,  
*Attorneys for said defendant.*

## 67 In United States District Court

[Title omitted.]

*Demurrer to indictment of defendant, Sidney Wanzer & Sons, Inc.,  
a corporation*

Filed January 7, 1939

The defendant, Sidney Wanzer & Sons, Inc., a corporation, by Loy N. McIntosh, David B. Genn, Frederick Secord, and J. Walter Stead, its attorneys, comes and demurs to the said indictment and each count thereof, and says that the same is not sufficient in law for it to plead unto, for the following reasons:

1. The indictment, and each count thereof, fails to state facts showing the commission of any offense over which this court has jurisdiction.
2. The indictment, and each count thereof, fails to state facts showing an unlawful combination and conspiracy in restraint of trade and commerce in fluid milk among the said several states of the United States, in violation of section 1 of the Act of Congress of July 2, 1890, entitled "An Act to protect trade and commerce against unlawful restraints and monopolies."
3. The alleged conspiracy set forth in each count of the indictment does not show facts sufficient to bring it within the purview of any statute of the United States of America.
- 68 4. The alleged conspiracy set forth in the indictment and each count thereof, relates to matters entirely within the jurisdiction of the laws of the State of Illinois and not within the inhibition of any laws of the United States.
5. The alleged conspiracy set forth in the indictment and each count thereof relates to a subject matter that is not justifiable but is removed from the criminal jurisdiction of this court in that the Congress of the United States, in its plenary power as the legislative department of the federal government, has legislated to remove the subject matter of each count from the purview of section 1 of the Sherman Act and to devolve upon the executive department of the federal government power to regulate said subject matter by administrative action.
6. The indictment, and each count thereof, in setting forth said alleged conspiracy, shows by the application of the doctrine of judicial notice that the alleged conspiracy in each count set forth expired and ended on March 2, 1935, and that the subject matter set forth as constituting the alleged conspiracy so terminated on March 2, 1935, was in fact commanded to be done by the United States of America.
7. The indictment, and each count thereof, is fatally defective in that there is no showing of fact as to the membership or relation of this defendant to the other codefendants named therein to connect it with the alleged conspiracy.
8. The indictment, and each count thereof, is fatally duplicitous.

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9. The indictment, in each count thereof, joins several separate, independent, disconnected, unrelated, and subordinate alleged conspiracies.
10. There is a misjoinder of counts.
11. The indictment, and each count thereof, is vague, indefinite, uncertain, ambiguous; and the allegations are not direct, certain, and positive, but are set up by way of conclusions, argumentative inferences and epithets.
12. The allegations of the indictment, and each count thereof, are inconsistent with and repugnant to each other.
13. The allegations of the indictment, and each count thereof, are vague, indefinite, and uncertain as to fail to apprise this defendant of the nature of the charge against it.
14. The indictment, and each count thereof, is barred by the statute of limitations.
15. By the presentation of specific objections, this defendant does not intend to waive the general objections herein contained, or any other objections not herein enumerated, to any count or counts of said indictment.

(Signed) LOY N. MCINTOSH,  
(Signed) DAVID B. GANN,  
(Signed) J. WALTER STEAD,  
(Signed) FREDERICK SECORD,  
*Attorneys for said defendant.*

70

In United States District Court

[Title omitted.]

*Demurrer to Indictment of Defendant, Louis Janata*

Filed January 7, 1939

The defendant, Louis Janata, by Loy N. McIntosh, David B. Gann, Frederick Secord, and J. Walter Stead, his attorneys, comes and demurs to the said indictment and each count thereof, and says that the same is not sufficient in law for him to plead unto, for the following reasons:

1. The indictment, and each count thereof, fails to state facts showing the commission of any offense over which this court has jurisdiction.
2. The indictment, and each count thereof, fails to state facts showing an unlawful combination and conspiracy in restraint of trade and commerce in fluid milk among the said several states of the United States, in violation of section 1 of the Act of Congress of July 2, 1890, entitled "An act to protect trade and commerce against unlawful restraints and monopolies."
3. The alleged conspiracy set forth in each count of the indictment does not show facts sufficient to bring it within the purview of any statute of the United States of America.

71 4. The alleged conspiracy set forth in the indictment and each count thereof, relates to matters entirely within the jurisdiction of the laws of the State of Illinois and not within the inhibition of any laws of the United States.

5. The alleged conspiracy set forth in the indictment and each count thereof, relates to a subject matter that is not justiciable but is removed from the criminal jurisdiction of this court in that the Congress of the United States, in its plenary power as the legislative department of the federal government, has legislated to remove the subject matter of each count from the purview of section 1 of the Sherman Act and to devolve upon the executive department of the federal government power to regulate said subject matter by administrative action.

6. The indictment, and each count thereof, in setting forth said alleged conspiracy, shows by the application of the doctrine of judicial notice that the alleged conspiracy in each count set forth expired and ended on March 2, 1935, and that the subject matter set forth as constituting the alleged conspiracy so terminated on March 2, 1935, was in fact commanded to be done by the United States of America.

7. The indictment, and each count thereof, is fatally defective in that there is no showing of fact as to the membership or relation of this defendant to the other co-defendants named therein to connect him with the alleged conspiracy.

8. The indictment, and each count thereof, is fatally duplicitous.

9. The indictment, in each count thereof, joins several separate, independent, disconnected, unrelated, and subordinate alleged 72 conspiracies.

10. There is a misjoinder of counts.

11. The indictment, and each count thereof, is vague, indefinite, uncertain, ambiguous; and the allegations are not direct, certain, and positive, but are set up by way of conclusions, argumentative inferences, and epithets.

12. The allegations of the indictment, and each count thereof, are inconsistent with and repugnant to each other.

13. The allegations of the indictment, and each count thereof, are so vague, indefinite, and uncertain as to fail to apprise this defendant of the nature of the charge against him.

14. The indictment, and each count thereof, is barred by the statute of limitations.

15. By the presentation of specific objections, this defendant does not intend to waive the general objections herein contained, or any other objections not herein enumerated, to any count or counts of said indictment.

(Signed) LOY N. MCINTOSH,

(Signed) DAVID B. GANN,

(Signed) FREDERICK SECORD,

(Signed) J. WALTER STEAD,

Attorneys for said defendant.

58      UNITED STATES VS. THE BORDEN COMPANY ET AL.  
73      In United States District Court

[Title omitted.]

*Demurrer to indictment of defendant, Western United Dairy Co., corporation*

Filed January 7, 1939

The defendant, Western United Dairy Co., a corporation, by Edward H. Murnane and James A. Harrington, comes and demurs to the said indictment and each count thereof, and says that the same is not sufficient in law for it to plead unto, for the following reasons:

1. The indictment, and each count thereof, fails to state facts showing the commission of any offense over which this court has jurisdiction.
2. The indictment, and each count thereof, fails to state facts showing an unlawful combination and conspiracy in restraint of trade and commerce in fluid milk among the said several states of the United States, in violation of section 1 of the Act of Congress of July 2, 1890, entitled "An Act to protect trade and commerce against unlawful restraints and monopolies."
3. The alleged conspiracy set forth in each count of the indictment does not show facts sufficient to bring it within the purview of any statute of the United States of America.
4. The alleged conspiracy set forth in the indictment and each count thereof, relates to matters entirely within the jurisdiction of the laws of the State of Illinois and not within the inhibition of any laws of the United States.
5. The alleged conspiracy set forth in the indictment and each count thereof, relates to a subject matter that is not justiciable but is removed from the criminal jurisdiction of this court in that the Congress of the United States, in its plenary power as the legislative department of the federal government, has legislated to remove the subject matter of each count from the purview of section 1 of the Sherman Act and to devolve upon the executive department of the federal government power to regulate said subject matter by administrative action.
6. The indictment, and each count thereof, in setting forth said alleged conspiracy, shows by the application of the doctrine of judicial notice that the alleged conspiracy in each count set forth expired and ended on March 2, 1935, and that the subject matter set forth as constituting the alleged conspiracy so terminated on March 2, 1935, was in fact commanded to be done by the United States of America.

7. The indictment, and each count thereof, is fatally defective in that there is no showing of fact as to the membership or relation of this defendant to the other co-defendants named therein to connect it with the alleged conspiracy.

- 75      8. The indictment, and each count thereof, is fatally duplicious.
9. The indictment, in each count thereof, joins several separate, independent, disconnected, unrelated, and subordinate alleged conspiracies.
10. There is a misjoinder of counts.
11. The indictment, and each count thereof, is vague, indefinite, uncertain, ambiguous; and the allegations are not direct, certain, and positive, but are set up by way of conclusions, argumentative inferences, and epithets.
12. The allegations of the indictment, and each count thereof, are inconsistent with and repugnant to each other.
13. The allegations of the indictment, and each count thereof, are so vague, indefinite, and uncertain as to fail to apprise this defendant of the nature of the charge against it.
14. The indictment, and each count thereof, is barred by the statute of limitations.
15. By the presentation of specific objections, this defendant does not intend to waive the general objections herein contained, or any other objections not herein enumerated, to any count or counts of said indictment.

(Signed) EDWARD H. MURNANE,  
 (Signed) JAMES A. HARRINGTON,  
*Attorneys for said defendant.*

## 76      In United States District Court

[Title omitted.]

*Demurrer to indictment of defendant, Western Dairy Company, Inc.,  
 a corporation*

Filed January 7, 1939

The defendant, Western Dairy Company, Inc., a corporation, by Edward H. Murnane and James A. Harrington, its attorneys, comes and demurs to the said indictment and each count thereof, and says that the same is not sufficient in law for it to plead unto, for the following reasons:

1. The indictment, and each count thereof, fails to state facts showing the commission of any offense over which this court has jurisdiction.
2. The indictment, and each count thereof, fails to state facts showing an unlawful combination and conspiracy in restraint of trade and commerce in fluid milk among the said several states of the United States, in violation of section 1 of the Act of Congress of July 2, 1890, entitled "An Act to protect trade and commerce against unlawful restraints and monopolies."
3. The alleged conspiracy set forth in each count of the indictment does not show facts sufficient to bring it within the purview of any statute of the United States of America.

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4. The alleged conspiracy set forth in the indictment and each count thereof, relates to matters entirely within the jurisdiction of the laws of the State of Illinois and not within the inhibition of any laws of the United States.

5. The alleged conspiracy set forth in the indictment and each count thereof, relates to a subject matter that is not justiciable but is removed from the criminal jurisdiction of this court in that the Congress of the United States, in its plenary power as the legislative department of the federal government, has legislated to remove the subject matter of each count from the purview of section 1 of the Sherman Act and to devolve upon the executive department of the federal government power to regulate said subject matter by administrative action.

6. The indictment, and each count thereof, in setting forth said alleged conspiracy, shows by the application of the doctrine of judicial notice that the alleged conspiracy in each count set forth expired and ended on March 2, 1935, and that the subject matter set forth as constituting the alleged conspiracy so terminated

78 on March 2, 1935, was in fact commanded to be done by the United States of America.

7. The indictment, and each count thereof, is fatally defective in that there is no showing of fact as to the membership or relation of this defendant to the other codefendants named therein to connect it with the alleged conspiracy.

8. The indictment, and each count thereof, is fatally duplicitous.

9. The indictment, in each count thereof, joins several separate, independent, disconnected, unrelated, and subordinate alleged conspiracies.

10. There is a misjoinder of counts.

11. The indictment, and each count thereof, is vague, indefinite, uncertain, ambiguous; and the allegations are not direct, certain, and positive, but are set up by way of conclusions, argumentative inferences, and epithets.

12. The allegations of the indictment, and each count thereof, are inconsistent with and repugnant to each other.

13. The allegations of the indictment, and each count thereof, are so vague, indefinite, and uncertain as to fail to apprise this defendant of the nature of the charge against it.

14. The indictment, and each count thereof, is barred by the statute of limitations.

79 15. By the presentation of specific objections, this defendant does not intend to waive the general objections herein contained, or any other objections not herein enumerated, to any count or counts of said indictment.

(Signed) EDWARD H. MURNAKE,

(Signed) JAMES A. HARRINGTON,

Attorneys for said defendant.

80 In United States District Court

[Title omitted.]

*Demurrer to indictment of defendant, United Dairy Company,  
a corporation*

Filed January 7, 1939

The defendant, *United Dairy Company*, a corporation, by Edward H. Murnane and James A. Harrington, its attorneys, comes and demurs to the said indictment and each count thereof, and says that the same is not sufficient in law for it to plead unto, for the following reasons:

1. The indictment, and each count thereof, fails to state facts showing the commission of any offense over which this court has jurisdiction.
2. The indictment, and each count thereof, fails to state facts showing an unlawful combination and conspiracy in restraint of trade and commerce in fluid milk among the said several states of the United States, in violation of section 1 of the Act of Congress of July 2, 1890, entitled "An Act to protect trade and commerce against unlawful restraints and monopolies."
3. The alleged conspiracy set forth in each count of the indictment does not show facts sufficient to bring it within the purview of any statute of the United States of America.
4. The alleged conspiracy set forth in the indictment and each count thereof, relates to matters entirely within the jurisdiction of the laws of the State of Illinois and not within the inhibition of any laws of the United States.
5. The alleged conspiracy set forth in the indictment and each count thereof, relates to a subject matter that is not justiciable but is removed from the criminal jurisdiction of this court in that the Congress of the United States, in its plenary power as the legislative department of the federal government, has legislated to remove the subject matter of each count from the purview of section 1 of the Sherman Act and to devolve upon the executive department of the federal government power to regulate said subject matter by administrative action.
6. The indictment, and each count thereof, in setting forth said alleged conspiracy, shows by the application of the doctrine of judicial notice that the alleged conspiracy in each count set forth expired and ended on March 2, 1935, and that the subject matter set forth as constituting the alleged conspiracy so terminated on March 2, 1935, was in fact commanded to be done by the United States of America.
7. The indictment, and each count thereof, is fatally defective in that there is no showing of fact as to the membership or relation of this defendant to the other co-defendants named therein to connect it with the alleged conspiracy.

8. The indictment, and each count thereof, is fatally duplicitous.
9. The indictment, in each count thereof, joins several separate, independent, disconnected, unrelated, and subordinate alleged conspiracies.
10. There is a misjoinder of counts.
11. The indictment, and each count thereof, is vague, indefinite, uncertain, ambiguous; and the allegations are not direct, certain, and positive, but are set up by way of conclusions, argumentative inferences, and epithets.
12. The allegations of the indictment, and each count thereof, are inconsistent with and repugnant to each other.
13. The allegations of the indictment, and each count thereof, are so vague, indefinite, and uncertain as to fail to apprise this defendant of the nature of the charge against it.
14. The indictment, and each count thereof, is barred by the statute of limitations.
15. By the presentation of specific objections, this defendant does not intend to waive the general objections herein contained, or any other objections not herein enumerated, to any count or counts of said indictment.

(Signed) EDWARD H. MURNANE,

(Signed) JAMES A. HARRINGTON,

Attorneys for said defendant.

84.

In United States District Court

[Title omitted.]

*Demurrer to indictment of defendant, Louis G. Glick*

Filed January 7, 1939

The defendant, Louis G. Glick, by Edward H. Murnane and James A. Harrington, his attorneys, comes and demurs to the said indictment and each count thereof, and says that the same is not sufficient in law for him to plead unto, for the following reasons:

1. The indictment, and each count thereof, fails to state facts showing the commission of any offense over which this court has jurisdiction.
2. The indictment, and each count thereof, fails to state facts showing an unlawful combination and conspiracy in restraint of trade and commerce in fluid milk among the said several states of the United States, in violation of section 1 of the Act of Congress of July 2, 1890, entitled "An Act to protect trade and commerce against unlawful restraints and monopolies."
3. The alleged conspiracy set forth in each count of the indictment does not show facts sufficient to bring it within the purview of any statute of the United States of America.

4. The alleged conspiracy set forth in the indictment and each count thereof, relates to matters entirely within the jurisdiction of the laws of the State of Illinois and not within the jurisdiction of the laws of the State of Illinois and not within the inhibition of any laws of the United States.

5. The alleged conspiracy set forth in the indictment and each count thereof, relates to a subject matter that is not justiciable but is removed from the criminal jurisdiction of this court in that the Congress of the United States, in its plenary power as the legislative department of the federal government, has legislated to remove the subject matter of each count from the purview of section 1 of the Sherman Act and to devolve upon the executive department of the federal government power to regulate said subject matter by administrative action.

6. The indictment, and each count thereof, in setting forth said alleged conspiracy, shows by the application of the doctrine of judicial notice that the alleged conspiracy in each count set forth expired and ended on March 2, 1935, and that the subject matter set forth as constituting the alleged conspiracy so terminated on March 2, 1935, was in fact commanded to be done by the United States of America.

86. 7. The indictment, and each count thereof, is fatally defective in that there is no showing of fact as to the membership or relation of this defendant to the other co-defendants named therein to connect him with the alleged conspiracy.

8. The indictment, and each count thereof, is fatally duplicitous.

9. The indictment, in each count thereof, joins several separate, independent, disconnected, unrelated, and subordinate alleged conspiracies.

10. There is a misjoinder of counts.

11. The indictment, and each count thereof, is vague, indefinite, uncertain, ambiguous; and the allegations are not direct, certain, and positive, but are set up by way of conclusions, argumentative inferences, and epithets.

12. The allegations of the indictment, and each count thereof, are inconsistent with and repugnant to each other.

13. The allegations of the indictment, and each count thereof, are so vague, indefinite, and uncertain as to fail to apprise this defendant of the nature of the charge against him.

14. The indictment, and each count thereof, is barred by the statute of limitations.

15. By the presentation of specific objections, this defendant does not intend to waive the general objections herein contained, or any other objections not herein enumerated, to any count or counts of said indictment.

(Signed) EDWARD H. MURNAU,  
(Signed) JAMES A. HARRINGTON,  
Attorneys for said defendant.

[Title omitted.]

*Demurrer to indictment of defendant, Maurice S. Dick*

Filed January 7, 1939

The defendant, Maurice S. Dick, by Edward H. Murnane and James A. Harrington, his attorneys, comes and demurs to the said indictment and each count thereof, and says that the same is not sufficient in law for him to plead unto, for the following reasons:

1. The indictment, and each count thereof, fails to state facts showing the commission of any offense over which this court has jurisdiction.
2. The indictment, and each count thereof, fails to state facts showing an unlawful combination and conspiracy in restraint of trade and commerce in fluid milk among the said several states of the United States, in violation of section 1 of the Act of Congress of July 2, 1890, entitled "An Act to protect trade and commerce against unlawful restraints and monopolies."
3. The alleged conspiracy set forth in each count of the indictment does not show facts sufficient to bring it within the purview of any statute of the United States of America.
4. The alleged conspiracy set forth in the indictment and each count thereof, relates to matters entirely within the jurisdiction of the laws of the State of Illinois and not within the jurisdiction of the laws of the State of Illinois and not within the inhibition of any laws of the United States.
5. The alleged conspiracy set forth in the indictment and each count thereof, relates to a subject matter that is not justiciable but is removed from the criminal jurisdiction of this court in that the Congress of the United States, in its plenary power as the legislative department of the federal government, has legislated to remove the subject matter of each count from the executive department of the federal government power to regulate said subject matter by administrative action.
6. The indictment, and each count thereof, in setting forth said alleged conspiracy, shows by the application of the doctrine of judicial notice that the alleged conspiracy in each count set forth expired and ended on March 2, 1935, and that the subject matter set forth as constituting the alleged conspiracy so terminated on March 2, 1935, was in fact commanded to be done by the United States of America.
90. 7. The indictment, and each count thereof, is fatally defective in that there is no showing of fact as to the membership or relation of this defendant to the other co-defendants named therein to connect him with the alleged conspiracy.

8. The indictment, and each count thereof, is fatally duplicitous.  
9. The indictment, in each count thereof, joins several separate, independent, disconnected, unrelated, and subordinate alleged conspiracies.

10. There is a misjoiner of counts.

11. The indictment, and each count thereof, is vague, indefinite, uncertain, ambiguous; and the allegations are not direct, certain, and positive, but are set up by way of conclusions, argumentative inferences, and epithets.

12. The allegations of the indictment, and each count thereof, are inconsistent with and repugnant to each other.

13. The allegations of the indictment, and each count thereof, are so vague, indefinite, and uncertain as to fail to apprise this defendant of the nature of the charge against him.

14. The indictment, and each count thereof, is barred by the statute of limitations.

91 15. By the presentation of specific objections, this defendant does not intend to waive the general objections herein contained, or any other objections not herein enumerated, to any count or counts of said indictment.

(Signed) EDWARD H. MURNAKE,

(Signed) JAMES A. HARRINGTON,

Attorneys for said defendant.

92 In United States District Court

[Title omitted.]

*Demurrer to indictment of defendant, Samuel S. Dick*

Filed January 7, 1939

The defendant, Samuel S. Dick, by Edward H. Murnane and James A. Harrington, his attorneys, comes and demurs to the said indictment and each count thereof, and says that the same is not sufficient in law for him to plead unto, for the following reasons:

1. The indictment, and each count thereof; fails to state facts showing the commission of any offense over which this court has jurisdiction.

2. The indictment, and each count thereof, fails to state facts showing an unlawful combination and conspiracy in restraint of trade and commerce in fluid milk among the said several states of the United States, in violation of section 1 of the Act of Congress of July 2, 1890, entitled "An Act to protect trade and commerce against unlawful restraints and monopolies."

3. The alleged conspiracy set forth in each count of the indictment does not show facts sufficient to bring it within the purview of any statute of the United States of America.

- 93 4. The alleged conspiracy set forth in the indictment and each court thereof, relates to matters entirely within the jurisdiction of the laws of the State of Illinois and not within the inhibition of any laws of the United States.
5. The alleged conspiracy set forth in the indictment and each court thereof, relates to a subject matter that is not justiciable but is removed from the criminal jurisdiction of this court, in that the Congress of the United States, in its plenary power as the legislative department of the federal government, has legislated to remove the subject matter of each count from the purview of section 1 of the Sherman Act and to devolve upon the executive department of the federal government power to regulate said subject matter by administrative action.
6. The indictment, and each count thereof, in setting forth said alleged conspiracy, shows by the application of the doctrine of judicial notice that the alleged conspiracy in each count set forth expired and ended on March 2, 1935, and that the subject matter set forth as constituting the alleged conspiracy so terminated on March 2, 1935, was in fact commanded to be done by the United States of America.
7. The indictment, and each count thereof, is fatally defective in that there is no showing of fact as to the membership or relation of this defendant to the other co-defendants named therein to connect him with the alleged conspiracy.
- 94 8. The indictment, and each count thereof, is fatally duplicitous.
9. The indictment, in each count thereof, joins several separate, independent, disconnected, unrelated, and subordinate alleged conspiracies.
10. There is a misjoinder of counts.
11. The indictment, and each count thereof, is vague, indefinite, uncertain, ambiguous; and the allegations are not direct, certain, and positive, but are set up by way of conclusions, argumentative inferences, and epithets.
12. The allegations of the indictment, and each count thereof, are inconsistent with and repugnant to each other.
13. The allegations of the indictment, and each count thereof, are so vague, indefinite, and uncertain as to fail to apprise this defendant of the nature of the charge against him.
14. The indictment, and each count thereof, is barred by the statute of limitations.
15. By the presentation of specific objections, this defendant does not intend to waive the general objections herein contained; or any other objections not herein enumerated, to any count or counts of said indictment.

(Signed) EDWARD H. MURNAH,  
(Signed) JAMES A. HARRINGTON,

Attorneys for said defendant.

## In United States District Court

[Title omitted.]

*Demurrer to indictment of defendant, Milk Dealers' Bottle Exchange,  
a corporation.*

Filed January 7, 1939

The defendant, Milk Dealers' Bottle Exchange, a corporation, by Loy N. McIntosh, David B. Gann, Frederick Secord, and J. Walter Stead, its attorneys, comes and demurs to the said indictment and each count thereof, and says that the same is not sufficient in law for it to plead unto, for the following reasons:

1. The indictment, and each count thereof, fails to state facts showing the commission of any offense over which this court has jurisdiction.

2. The indictment, and each count thereof, fails to state facts showing an unlawful combination and conspiracy in restraint of trade and commerce in fluid milk among the said several states of the United States, in violation of section 1 of the Act of Congress of July 2, 1890, entitled "An act to protect trade and commerce against unlawful restraints and monopolies."

3. The alleged conspiracy set forth in each count of the indictment does not show facts sufficient to bring it within the purview of any statute of the United States of America.

96 4. The alleged conspiracy set forth in the indictment and each count thereof relates to matters entirely within the jurisdiction of the laws of the State of Illinois and not within the inhibition of any laws of the United States.

5. The alleged conspiracy set forth in the indictment, and each count thereof, relates to a subject matter that is not justiciable but is removed from the criminal jurisdiction of this court in that the Congress of the United States, in its plenary power as the legislative department of the federal government, has legislated to remove the subject matter of each count from the purview of section 1 of the Sherman Act and to devolve upon the executive department of the federal government power to regulate said subject matter by administrative action.

6. The indictment, and each count thereof, in setting forth said alleged conspiracy, shows by the application of the doctrine of judicial notice that the alleged conspiracy in each count set forth expired and ended on March 2, 1935, and that the subject matter set forth as constituting the alleged conspiracy so terminated on March 2, 1935, was in fact commanded to be done by the United States of America.

7. The indictment, and each count thereof, is fatally defective in that there is no showing of fact as to the membership or relation of this defendant to the other codefendants named therein to connect it with the alleged conspiracy.

8. The indictment, and each count thereof, is fatally duplicitous.

9. The indictment, in each count thereof, joins several separate, independent, disconnected, unrelated and subordinate alleged conspiracies.

97. 10. There is a misjoinder of counts.

11. The indictment, and each count thereof, is vague, indefinite, uncertain, ambiguous; and the allegations are not direct, certain, and positive, but are set up by way of conclusions, argumentative inferences, and epithets.

12. The allegations of the indictment, and each count thereof, are inconsistent with and repugnant to each other.

13. The allegations of the indictment, and each count thereof, are so vague, indefinite, and uncertain as to fail to apprise this defendant of the nature of the charge against it.

14. The indictment, and each count thereof, is barred by the statute of limitations.

15. By the presentation of specific objections, this defendant does not intend to waive the general objections herein contained, or any other objections not herein enumerated, to any count or counts of said indictment.

(Signed) LOY N. MCINTOSH,

(Signed) DAVID B. GANN,

(Signed) FREDERICK SECORD,

(Signed) J. WALTER STEAD.

*Attorneys for Said Defendant.*

98. In United States District Court

[Title omitted.]

*Joint and several demurrer of the defendants, Associated Milk Dealers, Inc., Paul Potter, and Otto Black, to the indictment, and motion of said defendants, and each of them, to quash said indictment*

(Filed January 7, 1939)

Now come the defendants, Associated Milk Dealers, Inc., a corporation, Paul Potter, and Otto Black, and also come each of said defendants severally, by Russell J. McCaughey and Fred C. Nonnamaker, Jr., their attorneys, and having read the indictment herein say that said indictment, and each count thereof, separately and severally, and the matters therein contained, in manner and form as the same are therein alleged and set forth, are insufficient in law to require these defendants, or any or either of them, to plead to said indictment or any count thereof, or to answer the same, and that said indictment, and each count thereof, are insufficient in law to sustain a judgment against these defendants or any of them; and, without intending to waive any other substantial causes of demurser by the enumeration of the following specific causes, demur to said indictment and each count thereof and move to quash the same upon the following grounds:

1. Said indictment, and each count thereof, does not aver or set forth any facts or allege or charge the commission of any acts by the defendants, or any or either of them, constituting an offense against the United States of America.

99 2. Said indictment, and each count thereof, in purporting to allege an offense against the United States of America, fails to do so with the certainty required by law, but on the contrary are vague, indefinite, and uncertain to such an extent that these defendants, and each of them, are not advised thereby of the nature of the charges against them, and each of them, so that they, and each of them, may properly prepare and submit their several defenses, and each avail himself or itself of his or its conviction or acquittal for protection against a further prosecution for the same cause.

3. Section 1 of the Act of Congress of July 2, 1890, entitled, "An Act to Protect Trade and Commerce Against Unlawful Restraints and Monopolies," has been so amended, altered, modified and restricted by the Act of Congress of February 18, 1922, entitled, "An Act to Authorize Association of Producers of Agricultural Products," as to deny to defendants due process of law and equal protection of the laws in contravention of the Fifth Amendment of the Constitution of the United States of America, that is to say:

(a) Said Act of July 2, 1890, as amended, altered, modified and restricted, as aforesaid, arbitrarily and unreasonably discriminates between certain producers and associations of producers of agricultural products and other persons, including these defendants, and other associations, with respect to the definition, prohibition, and punishment of monopolies and restraints of trade in interstate trade and commerce.

(b) Said Act of July 2, 1890, so modified, amended, qualified, 100 and restricted, as aforesaid, arbitrarily and unreasonably discriminates between certain producers and associations of producers of agricultural products and all other persons, including these defendants, and other associations, by legalizing certain monopolies and restraints of interstate trade and commerce by such producers which are forbidden if intended or accomplished by others.

4. The indictment is void in that it was returned, without authority of law, at the October Term of this Court in the year 1938, by a Grand Jury impaneled and sworn at the July Term of said Court in the year 1938 and illegally sitting during said October Term, that is to say:

(a) The orders of August 31, 1938, and September 27, 1938, authorizing the Grand Jury to sit, respectively, during the September and October 1938 terms of the District Court, do not find or disclose that this indictment was the result of an investigation begun but not finished during said July Term, or that any investigation was begun but not finished during said July 1938 Term of this Court.

(b) The indictment does not show that the investigations alleged to have been begun but not finished during the July 1938 Term were not completed in the September 1938 Term.

5. None of the counts of said indictment states facts showing that these defendants, or any or either of them, have engaged in an unlawful combination or conspiracy in restraint of trade or commerce among the several states of the United States, that is to say:

101 (a) The first paragraph of each count, which undertakes to describe the supposed combination and conspiracy therein alleged, does not state facts showing that the matters and things therein complained of are or were an undue or unreasonable restraint of interstate trade and commerce.

(b) The means by which said supposed combinations and conspiracies were intended to be effected are not stated in said indictment or in any count thereof.

(c) It does not appear from the allegations of said counts or of any of them that the objects of purposes of said supposed combinations and conspiracies or of any of them were intended to be accomplished by any means which would effect on undue or unreasonable restraint of interstate trade or commerce.

6. The allegations of Count One are insufficient to show that these defendants, or any or either of them, engaged in an unlawful combination or conspiracy in restraint of trade or commerce among the several states of the United States in that

(a) It is alleged that some of the officers and directors of the Associated Milk Dealers, Inc., were also officers of some of the major distributors, but it is not alleged that said directors constituted a majority of the Board of Directors of said Associated Milk Dealers, or that said officers were empowered or authorized by said Board of Directors of Associated Milk Dealers to do or perform any of the acts complained of;

102 (b) It is alleged that the Associated Milk Dealers, Inc., was nothing more than an agency through which the major distributors acted as a unit in an arbitration of certain disputes concerning price provisions of contracts legally entered into between Pure Milk Association and certain distributors; and

(c) That certain officers of Associated Milk Dealers, Inc., met jointly with others to negotiate price provisions of contracts legally entered into with Pure Milk Association, but it is not alleged that such officers were duly authorized to act for the association.

7. The allegations of Count Two of said indictment are insufficient to give this court jurisdiction over the matters and things therein set forth with respect to these defendants and wholly fails to state an offense by these defendants against the United States of America, that is to say;

(a) It affirmatively appears from the allegations of said count that interstate trade or commerce, if any, in fluid milk had ceased and terminated prior to the alleged performance of acts by these defendants;

(b) It is not shown by the allegations of said count that the alleged acts of these defendants, therein complained of, restrain or restrained interstate trade or commerce;

(c) It does not appear that the business of resale to Illinois purchasers of fluid milk shipped from outside the State of Illinois after processing and commingling in Illinois with Milk produced in Illinois involves interstate trade and commerce, and the acts alleged to have been performed by these defendants relate only to matters pertaining to such resale;

103 (d) It does not appear from said count that the acts of these defendants alleged relate in any manner to the conspiracy charged or in any manner furthered such conspiracy.

8. The allegations of Count Three of said indictment are insufficient to give this court jurisdiction over the matters and things therein set forth and wholly fail to state an offense against the United States of America, that is to say:

(a) It is not shown by the allegations of said count that the alleged acts of the defendants, therein complained of, restrain or restrained interstate trade or commerce;

(b) It does not appear that the business of distributing fluid milk in the City of Chicago, alleged to have been hindered and prevented, involved interstate trade and commerce;

(c) The overt act alleged to have been performed by these defendants is not shown to relate in any manner to the conspiracy charged or to in any manner further such conspiracy.

9. The allegations of Count Four of said indictment do not show that these defendants or any of them have engaged in an unlawful combination or conspiracy in restraint of trade or commerce among the several states of the United States, that is to say:

(a) It appears from said allegations that the object and effect of the said supposed combination and conspiracy therein alleged was the adoption of the base-surplus plan, and it does not appear that the base-surplus plan is or was an unlawful or unreasonable restraint of trade or commerce;

104 (b) It appears from the allegations of the indictment that the alleged restraint and control complained of in Count Four was and is restraint and control of production and not restraint or control of the commerce among the several states;

(c) It does not appear by the allegations of said count that the base-surplus plan limits or restrains either the production of milk or trade and commerce in milk.

10. The indictment fails to allege sufficient acts and intents on the part of these defendants with reasonable particularity of time and place and circumstance to charge these defendants with a crime.

11. It does not appear from any count in said indictment that the acts charged against these defendants, if proved, will support a conviction.

12. The entire substance of the acts charged against these defendants is as consistent with the hypothesis of innocence as with that of guilt, and the indictment in each and every count thereof, severally and separately considered, fails to allege an offense.

13. The indictment in each and every count thereof fails to inform these defendants of the nature and cause of the accusation as required under Amendment VI of the United States Constitution.
14. The alleged conspiracy set forth in the indictment and each count thereof relates to a subject matter that is not justiciable but is removed from the criminal jurisdiction of this court in that the Congress of the United States, in its plenary power as the legislative department of the federal government, has legislated to remove the subject matter of each count from the purview of section 105 of the Sherman Act and to devolve upon the executive department of the federal government power to regulate said subject matter by administrative action.
15. The indictment, and each count thereof, in setting forth said alleged conspiracy, shows by the application of the doctrine of judicial notice that the alleged conspiracy in each count set forth expired and ended on March 2, 1935, and that the subject matter set forth as constituting the alleged conspiracy so terminated on March 2, 1935, was in fact commanded to be done by the United States of America.
16. The indictment, and each count thereof, is fatally defective in that there is no showing of fact as to the membership or relation of this defendant to the other codefendants named therein to connect it with the alleged conspiracy.
17. The averments of the acts of these defendants do not make clear that such acts had some relation to the conspiracy.
18. The indictment, and each count thereof, is fatally duplicitous.
19. The indictment, in each count thereof, joins several separate, independent, disconnected, unrelated, and subordinate alleged conspiracies.
20. Because certain defects are specified herein, it is not intended that any defects, omissions, or imperfections are waived, and the same are hereby insisted upon with like effect as if the same were herein specifically set forth and enumerated.

Wherefore, the defendants, and each of them, pray judgment that this demurrer be sustained as to them, and each of them; that 106 said indictment, and each count thereof, be quashed and that they, and each of them, be dismissed and discharged of this indictment by the Court.

ASSOCIATED MILK DEALERS, INC.,

*A Corporation,*

PAUL POTTER, and OTTO BLACK,

*Defendants.*

By (Signed) RUSSELL J. McCaughey,

(Signed) FRED C. NONNAMAKER, JR.,

(Signed) RUSSELL J. McCaughey,

(Signed) FRED C. NONNAMAKER, JR.,

*Their Attorneys.*

*Attorneys for said Defendants.*

To MESSRS. WILLIAM J. CAMPBELL, *United States Attorney.*

LEO J. TIERNEY, *Special Assistant Attorney General.*

## In United States District Court

[Title omitted.]

*Demurrer of defendants, Robert G. Fitchie, James G. Kennedy, Steve C. Sumner, Fred Dahms, F. Ray Bryant, John O'Connor, and David A. Riskind*

Filed January 7, 1939

The defendants, Robert G. Fitchie, James G. Kennedy, Steve C. Sumner, Fred Dahms, F. Ray Bryant, John O'Connor, and David A. Riskind, jointly, severally, and jointly and severally, by their attorney, Joseph A. Padway, demur to the indictment and to each and every of the separate counts of the indictment on the following grounds:

## I

Count III of the indictment, especially Paragraph 76, is bad for duplicity and multifariousness in that said count charges several separate and independent alleged violations of Section 1 of the Sherman Anti-Trust Act, the which alleged violations are not related, and to each of which alleged violations the defendants, and each of them, would be required to offer separate and independent evidence; further, that the jury in arriving at a verdict under this court would be confused and misled because of the existence of the several separate and independent charges made therein, and the defendants and each of them would be prejudiced thereby.

## II

That the said indictment, and each and every of the four counts of the same, does not state facts sufficient to constitute a crime against the United States of America, because:

A. The facts alleged in Paragraph 39 of the indictment show that the Milk Wagon Drivers' Union, Local 753, International Brotherhood of Teamsters, Chauffeurs, Stablemen and Helpers of America (referred to in the indictment as Local 753), being a voluntary unincorporated association of individuals is not under the law of the State of Illinois and of the United States of America a legal entity, and therefore has no legal capacity to be sued or to be indicted as a legal entity;

B. Under Section 17 of the Sherman Anti-Trust Act and under the various provisions of the Norris-LaGuardia Act, Local 753 is not subject to criminal prosecution for the acts alleged in the indictment; under Section 17 of the Sherman Anti-Trust Act and under the provisions of the Norris-LaGuardia Act, the officials or agents of Local 753 are not subject to criminal prosecution for the acts alleged in the indictment; that under said statutes the acts of these defendants as alleged in the indictment did not constitute a crime against the United States of America.

C. The allegations in Paragraphs 39, 40, 47, 48, 58, 59, 60, 63; and Paragraphs 64, 71, 72, 73; and Paragraphs 76, 77, 83, 84, 85, and Paragraphs 88, 89, 95, 96, and 97 are conclusions of law and conclusions of fact and are not allegations of definite facts; that the allegations in these paragraphs as to the alleged conspiracy and alleged overt acts by these defendants are so vague, indefinite and uncertain that the defendants and each and all of them are not informed of the nature and cause of accusation against them as required by the provisions of the Sixth Amendment to the Constitution of the United States of America; and these allegations do not enable the defendants and each and all of them to make a proper defense to the indictment or plead their jeopardy in bar of a later prosecution for the same alleged offense.

109 D. That the facts alleged in the following paragraphs at places indicated show that there was no crime against the United States of America within the meaning of Section 1 of the Sherman Anti-Trust Act because such facts do not affect commerce within the meaning of said section for the reason that such facts indicate that the defendants' acts as charged in the indictment affected intrastate commerce and did not affect interstate commerce; this is shown specifically in the following paragraphs:

(1) Paragraph 24 referring to production of fluid milk and to distribution and sale of fluid milk in the City of Chicago;

(2) Paragraph 58 referring to distribution of fluid milk within Chicago, and referring to the denying of membership to duly qualified drivers in the employ of independents;

(3) Paragraph 59 referring to the counsel, advise and directing of Local 753;

(4) Paragraph 60 referring to counsel, advise and directing of Local 753 and referring to the protecting of officials, agents, and members of Local 753 from arrest and prosecution;

(5) Paragraph 63 referring to fixing and maintaining prices for the sale by distributors in Chicago of fluid milk shipped into Chicago from States outside of Illinois;

(6) Paragraph 71 referring to distribution of fluid milk within Chicago, and referring to the denying of membership to duly qualified drivers in the employ of independents, and referring to the compelling of independent distributors to sell fluid milk at noncompetitive prices;

(7) Paragraph 72 referring to the counsel, advise and directing of Local 753;

(8) Paragraph 73 referring to counsel, advise and directing of Local 753 and referring to the protecting of officials, agents, and members of Local 753 from arrest and prosecution;

110 (9) Paragraph 76 referring to the preventing of independent producer from engaging in the business of distributing fluid milk in Chicago and to hinder them from competing with the major distributors and to hinder and prevent distribution of fluid

milk to the stores and by stores in Chicago, and to prevent any distribution of fluid milk in Chicago except by the method and in the manner determined by the defendants.

(10) Paragraph 83 referring to the compelling and coercing of independent distributors to acquire the business of existing fluid milk distributors as a condition precedent to entering business of distributing milk in Chicago and referring to the compelling of independent distributors to observe certain unwritten rules with respect to distributing fluid milk and specifically the rule that required that not more than one distributor should serve any stop and no independent distributor should take stops away from major distributors, and referring to the refusal to enter into labor contracts with independent distributors unless they would observe such unwritten rules, and referring to the compelling of store proprietors to refrain from distributing fluid milk at said stores in Chicago, and referring to the compelling of independent vendor distributors to restrain from distributing fluid milk in Chicago; and referring to the picketing of stores distributing fluid milk and referring to the engaging in secondary boycotts, and referring to the threatening to injure and injuring persons, and referring to the threatening to and damaging and destroying of property, and referring to the attempting to and forcibly detaining employees of distributors and referring to the threatening to and calling of strikes of employees of distributors.

(11) Paragraph 84 referring to the counsel, advise, and directing of Local 753;

(12) Paragraph 85 referring to the counsel, advise, and directing of Local 753 and referring to the protecting of officials, agents, and members of Local 753 from arrest and prosecution;

(13) Paragraph 95 referring to the resort to threats because of violence or other coercive means against independent distributors who attempted to induce member producers to withdraw from and refuse to sell their milk through the Pure Milk Association, and referring to the denying of membership in Local 753 to duly qualified drivers in the employ of such independent distributors.

111 (14) Paragraph 96 referring to the counsel, advise, and directing of Local 753;

(15) Paragraph 97 referring to the counsel, advise, and directing of Local 753 and referring to the protecting of officials, agents, and members of Local 753 from arrest and prosecution;

### III

That the indictment and each and every count on their face show that it is subject to the defense of the statute of limitations (as found in 18 U. S. C. A., Section 582), in that under Paragraph 1 of the indictment, these defendants are charged with having committed certain alleged offenses beginning in the month of January, A. D. 1935, whereas the indictment was not presented until November 1st, 1938, a

period of more than three years after the commission of the alleged offense as charged by Paragraph 1 of the indictment and as repeated in Paragraphs 47, 63, 76, and 88.

Wherefore, the defendants demand judgment dismissing the indictment in whole and discharging them from custody or judgment, dismissing the indictment in part as to each and every separate count thereof and to have such count or counts stricken from the indictment.

JOSEPH A. PADWAY,  
Attorney for defendants.

112

In United States District Court

[Title omitted.]

*Demurrer of Leslie G. Goudie, one of the defendants herein, to the indictment and motion of said defendant to quash said indictment*

Filed January 7, 1939

Now comes the defendant; Leslie G. Goudig, by Weymouth Kirkland and Jay Fred Reeve, his attorneys, and having read the indictment herein, says that said indictment and each count thereof and the matters therein contained, in manner and form as the same are therein alleged and set forth, are insufficient in law to require this defendant to plead to said indictment or any court thereof, or to answer the same, and that said indictment and each count thereof are insufficient in law to sustain a judgment against this defendant: and, without intending to waive any other substantial causes of demurrer by the enumeration of the following specific causes, demurs to said indictment and each count thereof and moves to quash the same upon the following grounds:

1. Said indictment, and each count thereof, does not aver or set forth any facts or allege or charge the commission of any acts by the defendant constituting an offense against the United States of America.

113 2. Said indictment, and each count thereof, in purporting to allege an offense against the United States of America, fails to do so with the certainty required by law, but on the contrary is vague, indefinite, and uncertain to such an extent that this defendant is not advised thereby of the nature of the charges against him so that he may properly prepare and submit his defense.

114 3. The indictment is void in that it was returned, without authority of law, at the October Term of this Court in the year 1938 by a Grand Jury impaneled and sworn at the July Term of said Court in the year 1938 and

(a) The orders of August 31, 1938, and September 27, 1938, authorizing the Grand Jury to sit, respectively, during the September and October 1938 terms of the District Court, do not find or disclose that

this indictment was the result of an investigation begun but not finished during said July Term, or that any investigation was begun but not finished during said July 1938 Term of this Court.

(b) The indictment does not show that the investigations alleged to have been begun but not finished during the July 1938 Term were not completed in the September 1938 Term.

4. None of the counts of said indictment states facts showing that this defendant has engaged in an unlawful combination or conspiracy in restraint of trade or commerce among the several states of the United States; that is to say,

(a) The first paragraph of each count, which undertakes to describe the supposed combination and conspiracy therein alleged, does not state facts showing that the matters and things therein complained of are or were an undue or unreasonable restraint of interstate trade and commerce.

115 Wherefore, this defendant prays judgment that this demurrer be sustained as to him, that said indictment, and each count thereof, be quashed, and that he be dismissed and discharged of this indictment by the Court.

LESLIE G. GOUDIE,  
By (Signed) WEYMOUTH KIRKLAND,  
(Signed) JAY FRED REEVE,  
*His Attorneys.*

116

In United States District Court

[Title omitted.]

*Motion to quash and demurrer for and in behalf of the defendants, Pure Milk Association, Don. N. Geyer, Edward F. Cooke, E. E. Houghtby, F. J. Knox, Lowell D. Oranger, and John P. Case*

Filed January 7, 1939

Now come the defendants, Pure Milk Association, by its undersigned attorneys, and Don N. Geyer, Edward F. Cooke, E. E. Houghtby, F. J. Knox, Lowell D. Oranger, and John P. Case, each in their own proper person, by the undersigned attorneys, and move to quash and demur to the indictment and each and every count thereof as presented herein against them and each of them, and in support thereof show:

1. Said indictment and each and every count thereof fails to state an act or omission committed by these defendants, or any of them, contrary to the Act of Congress approved July 2, 1890, entitled "An Act to protect Trade and Commerce against Unlawful Restraints and Monopolies," or existing laws applicable to each of these defendants.

2. Said indictment and each and every count thereof fails to state a cause of action for indictment and prosecution against all or any

one of these defendants, or under any existing laws applicable to these defendants, or either of them, by or in the name of the United States of America.

117 3. Said indictment and each count thereof fails to state a cause of action for indictment and prosecution for any offense, act or thing done or committed by these defendants, or any of them, against the existing laws and statutes of the United States of America.

4. Said indictment and each and every count thereof fails to state a cause of action against these defendants, or any of them, for an offense against any existing laws and statutes of the United States.

5. Said indictment and each count thereof, and any projected plan of prosecution thereunder is a departure from the due and orderly process of law intended and provided for by existing Acts of Congress, hereinafter mentioned or referred to, relating to associations of producers of agricultural products and cooperative marketing agencies adjunct thereto, for the determination and correction of the evils, misusages or transgressions of its rights, powers and privileges attributed to the defendant, Pure Milk Association, and the several individuals associated with or employed by it in its acts and conduct as a cooperative marketing agency.

6. That said indictment and each count thereof is designed for purely punitive administration for violations of Section 1 of the Act of Congress approved July 2, 1890, entitled, "An Act to Protect Trade and Commerce against Unlawful Restraints and Monopolies," commonly known as the Sherman Anti-Trust Act of 1890, in accordance with the form and purpose of said law at the time of its enactment and without reference or consideration to subsequent legislation concerning monopolies and acts and conduct in restraint of interstate commerce and trade, and totally ignores all later enacted and presently existing supplementary federal and state laws authorizing

118 the creation of agricultural cooperative organizations or associations by persons engaged in the production of agricultural products as farmers, planters, ranchmen, dairymen, nut or fruit growers, and the organization and operation of associations, corporate or otherwise, for the purpose of collectively processing, preparing for market, handling and marketing in interstate and foreign commerce such products of persons so engaged, and the corollary acts of Congress enacted concurrently therewith and in addition thereto and especially designed to regulate the conduct of such associations and organizations both with respect to monopolies and restraints upon interstate commerce and trade. Said later enactments which are hereinafter more particularly set forth or referred to, do not provide for, nor is warranted thereunder any choice or election of remedy by way of indictment or complaint and inquiry in respect to the application of the antitrust laws to agricultural cooperatives or cooperative marketing agencies such as the defendant, Pure Milk Association, or to correct the evils, misdirections or transgressions, attributed to these defendants, set forth or referred to in the indictment.

7. Said indictment and each count thereof totally ignores the provisions of said later and supplementary federal legislation intended to furnish means of applying corrective measures by way of complaint by serving upon such association a complaint stating its charge in that respect together with a notice for hearing, specifying a day and place not less than thirty days after the service thereof requiring the association to show cause why an order should not be made directing it to cease and desist from monopolization or restraint of trade, and permitting the association so complained of to show cause why such order should not be entered, and the further action by and under the authority vested by said later enactment in the Secretary of Agriculture for the purpose of correcting mis-  
119 usages by such associations with respect to monopolies or restraints upon interstate trade and commerce, instead of direct and peremptory penal action by way of criminal indictment and prosecution; that said indictment and each and every count thereof is an action in form of prosecution by indictment, and therefore an unauthorized departure from the policy of correction through complaint and inquiry of and by the Secretary of Agriculture of the United States as provided by said supplementary legislation herein-after more particularly set out and referred to.

8. That said indictment and each count thereof is an unauthorized and unwarranted attempt to prosecute these defendants and enforce the penal provisions of Section 1 of said Sherman Anti-Trust Law of July 2, 1890, without any regard to said subsequent legislation herein referred to; which definitely excludes these defendants, and each of them, from any prosecution under the penal provisions of said Act, by way of indictment, and is contrary to and in violation of the due process clause of Article V of the Amendments of the Federal Constitution.

9. That said indictment and each count thereof fails to charge the defendant, Pure Milk Association, and its officers and agents named in said indictment, with having violated any of the provisions of The Agricultural Cooperative Act of Illinois under which the defendant, Pure Milk Association, was organized and is now doing business.

10. That said indictment and each count thereof fails to charge these defendants of having violated any of the Federal laws applicable to cooperative associations engaged in cooperative bargaining for and in behalf of its member producers, as provided by the Acts of Congress passed subsequent to said Sherman Anti-Trust law  
120 of July 2, 1890, especially designed to regulate the conduct of such associations with respect to interstate commerce; that each and every count filed herein fails to charge these defendants with having violated any of the terms and conditions of the Clayton Anti-Trust Act of October 15, 1914, the Capper-Volstead Act of February 18, 1922, the Cooperative Marketing Act of July 2, 1926, the Agricultural Adjustment Act of May 12, 1933, or the Agricultural

Marketing Agreement Act of 1937, all of which are Federal acts applicable to cooperative associations engaged in cooperative bargaining, for or on behalf of their producer members.

11. That said indictment and each count thereof fails to make any direct allegations of any overt act on the part of these defendants, or any of them, as having in any way unlawfully interfered with interstate commerce in the transportation of fluid milk from the states of Michigan, Wisconsin, and Indiana into the State of Illinois in violation of any of the acts hereinabove referred to.

12. That said indictment and each count thereof is an aggression upon the rights and powers especially delegated to the Secretary of Agriculture by the supplementary Acts of Congress herein referred to and by virtue of which he is the duly constituted authority to control the policies and conduct of agricultural cooperative and marketing associations and to apprehend and administer corrective measures for misuse or abuse by such associations or agencies with respect to restraint of trade and commerce in fluid milk, in or among the several states of the United States, and to protect said trade and commerce against unlawful restraints and monopolies.

13. That said indictment and each and every count thereof fails to adequately and with sufficient particularity to charge the defendants, Don N. Geyer, Edward F. Cooke, E. E. Houghtby, F. J. Knox, Lowell D. Oranger, and John P. Case, or any one of them, with having authorized, ordered, or done any of the overt acts alleged therein.

121 14. That in said indictment it is charged that these defendants were parties to the creation or fixing of "uniform, arbitrary, and non-competitive prices," but nowhere in any of said counts is it charged that the price of any agricultural product was "unduly enhanced" by reason thereof.

15. That in said indictment mere naked charges are made concerning the use of certain contracts and price lists therein mentioned, without stating the material substance thereof, or the manner in which these defendants, or any or either of them, by and through the use or misuse of said contracts or the publication of said price lists, have violated any of the above-mentioned acts, so that this Court can determine on the face of the indictment whether or not said contracts, price lists, or any other agreements mentioned therein were or are in violation of the Sherman Anti-Trust Act of July 2, 1890, or any subsequent laws above referred to, under which these defendants, or any or either of them, are sought to or could be prosecuted by way of criminal indictment, copies of which contracts and price lists these defendants are ready and willing to produce so that this Court may determine whether they are in fact in violation of any of the laws above referred to.

16. That the indictment fails to state a cause of action against these defendants, or any or either of them, of which this Court ought to accept jurisdiction, for the reason that the alleged cause of action

stated in the indictment and each count thereof consists of matters of alleged offenses which, under the existing laws and statutes, are cognizable for the purpose of corrective administration only by the Secretary of Agriculture of the United States, and are not offenses which constitute such matter for prosecution by way of criminal indictment.

122 17. That the indictment and each and every count thereof fails to show that during the period covered thereby, including the date of the filing thereof, there was in force certain Acts of Congress which were passed, approved, and became effective subsequent to the enactment of the Sherman Anti-Trust Act as approved July 2, 1890, entitled, "An Act to Protect Trade and Commerce against Unlawful Restraints and Monopolies," no part of which subsequent Acts of Congress are included, considered, or referred to in said indictment; and all of which, or some parts of which, contain provisions which require the allegation of acts, intents, purposes, and designs set forth with reasonable particularity, directly, and not inferentially, and sufficiently certain and clear to show a violation thereof before any valid indictment for the offenses charged in this indictment could be found against these defendants, or any or either of them, none of which said allegations are contained or set forth in this indictment or any count thereof.

18. That said indictment recites that the Pure Milk Association is organized under the Act of the General Assembly of the State of Illinois entitled, "The Cooperative Marketing Act," and that since the date of its incorporation under said act and during the period covered by the indictment, Pure Milk Association has been duly authorized to do business under and by virtue of said act; that said indictment and each and every count thereof fails to allege the object and purpose of said organization as shown by the Articles of Incorporation of the Pure Milk Association as certified to by the Secretary of State of the State of Illinois, which are in words and figures as follows:

"The purpose for which it is formed is to be a non-profit, co-operative agricultural association without capital stock, organized for the mutual help and benefit of its members; to promote the general welfare of its members and to provide better and more economical methods of marketing the dairy products of its members through cooperation; to act as agent for its members in handling and marketing their dairy products and in supplying to its members machinery, equipment, and supplies; to cooperate with other associations or individuals engaged in similar purposes; to have and exercise all of the powers necessary and proper to carry into effect the purpose for which such corporation is formed, and to do any and all things incident to the above purpose."

or that part of Section 3 of Article One of the By-Laws of said Pure Milk Association adopted by the members thereof, relating to the purpose for which it was formed, which reads as follows:

"The purpose for which it is formed is: To be a non-profit, co-operative agricultural association without capital stock instituted for the mutual help and benefit of its members; to promote the general welfare of its members and the business of dairying in the Chicago Fluid Milk District; to cooperate with other associations or individuals engaged in similar purposes; to have and exercise all of the powers necessary and proper to carry into effect the purpose of which such corporation is formed, and to do any and all things incident to the above purpose."

or of Section 4 of Article Two of the said By-Laws, which reads as follows:

"The voting power of all members shall be equal. Each member shall have one vote and one vote only."

or the provisions of Section 2 (c) of said "The Agricultural Co-operative Act" of the State of Illinois which provides:

"The term 'association' means any corporation organized under this Act, or any corporation formed under any general or special act of this or any other state as a cooperative association, organized for the mutual benefit of its members, and in which the returns on the stock or membership capital is limited to an amount not to exceed eight per centum (8%) per annum, and in which during any fiscal year thereof the value of business done with non-members shall not exceed the business done with members during the same period and in which substantially all of the issued and outstanding shares of capital stock or memberships are owned, held, and controlled directly or indirectly, by producers of agricultural products."

or of Section 15 of said Act which provides:

"No member in any association without capital stock shall be entitled to more than one (1) vote."

All of said provisions of said Act and By-Laws conform to the requirements of the said Capper-Volstead Act which provides that associations that desire to come within the Act must be

124 "operated for the mutual benefit of the members thereof, as such producers, and conform to one or both of the following requirements:

"First. That no member of the association is allowed more than one vote because of the amount of stock or membership capital he may own therein or

"Second. That the association does not pay dividends on stock or membership capital in excess of 8 per cent per annum.

"And in any case to the following:

"Third. That the association shall not deal in products of non-members to an amount greater in value than such as are handled by it for members."

That said indictment and each and every count thereof fails to charge defendants Pure Milk Association, Don N. Geyer, Edward F. Cooke, E. E. Houghtby, F. J. Knox, Lowell D. Oranger, and

John P. Case, or any one of them, with having violated any of the requirements of the Capper-Volstead Act, or with carrying out the objects and purposes for which said Pure Milk Association was organized under the laws of the State of Illinois in any unlawful manner, or with having violated any of the laws of the United States in existence during the period covered by the indictment, designed for the protection of trade and commerce among the several states against the unlawful restraints and monopolies.

19. That said indictment and each and every count thereof fails to charge an offense against the United States of America with the certainty required by law so as to fairly inform these defendants of the nature of the charges intended thereby to be preferred against them and each of them and thereby enable these defendants to understand the exact nature of the charge to be met and properly prepare and submit their several defenses, and is in many other respects vague, indefinite, and uncertain.

20. The indictment is void in that it was returned without authority of law at a term of this court which was not the term at which the Grand Jury which returned the indictment was convened, for the following reasons:

125 (a) Neither the order of July 31, 1938, nor the order of September 27, 1938, entered by this court, each of which purports to authorize the Grand Jury to sit beyond the July 1938 term of this court, contains findings of fact to the effect that there was any unfinished investigations begun by said Grand Jury at the July 1938 term of this court which would warrant this court in permitting said Grand Jury to continue to sit beyond said July 1938 term thereof, in accordance with the provisions of Section 284 of the Act of Congress of March 3, 1911, entitled "An Act to Codify, Revise, and Amend the Laws Relating to Judiciary" as amended. (U. S. Code Annotated, Title 28, Section 421.)

(b) That the orders of August 31, 1938, and of September 27, 1938, were entered several days prior to the termination of the August 1938 and of the September 1938 terms, respectively, of this court in violation of Section 284 of the Act of Congress of March 3, 1911, entitled "An Act to Codify, Revise, and Amend the Laws Relating to Judiciary" as amended. (U. S. Code Annotated, Title 28, Section 421.)

(c) The indictment fails to disclose that any investigation begun by the Grand Jury in the July 1938 term of this court was not completed prior to the October 1938 term.

(d) This court had no authority to authorize said Grand Jury to sit during the October 1938 term of this court on its request because by order entered on August 31, 1938, this court had attempted to authorize said Grand Jury to sit during the September 1938 term of this court.

21. The indictment and each and every count thereof fails to allege facts sufficient to show an unlawful combination and conspiracy or means to render said alleged combination and conspiracy unlawful under Section 1 of an Act of Congress dated July 2,

126 1890, entitled "An Act to Protect Trade and Commerce Against Unlawful Restraints and Monopolies."

22. That Count 2 of said indictment fails to state facts sufficient to constitute a crime against the United States under Section 1 of an Act of Congress dated July 2, 1890, entitled "An Act to Protect Trade and Commerce Against Unlawful Restraints and Monopolies," in that it contains allegations repugnant one to the other, certain of which are entirely consistent with the innocence of these defendants of the alleged crime sought to be charged in said count.

23. Count 3 of the indictment does not state facts sufficient to constitute a crime against the United States under Section 1 of An Act of Congress dated July 2, 1890, entitled "An Act to Protect Trade and Commerce Against Unlawful Restraints and Monopolies," in that:

(a) The count fails to set forth facts sufficient to show that the defendants combined and conspired to restrain trade or commerce among the several states.

(b) The count fails to set forth facts to show that the distribution of fluid milk by so-called independent distributors, or the distribution of milk to stores and by stores in the City of Chicago, constitute trade or commerce among the several states.

24. Count 4 of the indictment fails to state facts sufficient to constitute a crime against the United States under Section 1 of an Act of Congress dated July 2, 1890, entitled "An Act to Protect Trade and Commerce Against Unlawful Restraints and Monopolies," in that:

(a) The count fails to allege facts to demonstrate an unreasonable or direct restraint of trade or commerce among the several states.

(b) The count fails to allege means of accomplishing said combination which would render the same unlawful.

127 (c) The count fails to allege facts to demonstrate any restraint of trade or commerce among the several states.

(d) The count fails to sufficiently define the means, i. e., the base surplus plan, alleged to have been adopted by the defendants for the purpose of restraining trade or commerce among the several states.

Because certain defects in said indictment are specified herein it is not intended that any defects, omissions, or imperfections are waived, and the same are hereby insisted upon with like effect as if the same were herein specifically set forth and enumerated.

Wherefore, the defendants, Pure Milk Association, Don N. Geyer, Edward F. Cooke, E. E. Houghtby, F. J. Knox, Lowell D. Oranger, and John P. Case, and each of them, pray that this motion to quash and demurrer may be sustained and demand judgment dismissing

the indictment and each and every count thereof, discharging them and each of them from custody.

(Signed) Pure Milk Association, (signed) Don N. Geyer,  
(signed) Edward F. Cooke, (signed) E. E. Houghtby;  
(signed) F. J. Knox, (signed) Lowell D. Oranger,  
(signed) John P. Case; by (signed) Schuyler Hennessy, by (signed) George W. Lennon, by (signed) Wm. C. Graves, by (signed) Martin Burns, Attorney for said Defendants, 231 South LaSalle Street, Chicago, Illinois.

To Messrs. WILLIAM J. CAMPBELL, United States Attorney.

LEO F. TIERNEY, Special Assistant Attorney General.

128 [Duly sworn to by Martin Burns; jurat omitted in printing.]

129 In United States District Court

[Title omitted,]

*Demurrer of Leland Spencer*

Filed January 7, 1939

And the defendant, Leland Spencer, by Isham, Lincoln & Beale, Ben H. Matthews, and James P. Dillie, his attorneys, comes and defends, etc.; when, etc.; and says that the said indictment and the matters therein contained in each and every count thereof, in manner and in form as the same are above set forth, are not sufficient in law for the plaintiff to maintain its aforesaid action, and that he, the defendant, is not bound by law to answer the same; and this he is ready to verify; wherefore, for want of a sufficient indictment in this behalf, this defendant, Leland Spencer, prays judgment and that the plaintiff may be barred from maintaining its aforesaid action, etc.

And the defendant, Leland Spencer, shows to the court here the following causes of demurrer to the said indictment and each and every count thereof, that is to say that,

1. The indictment and each and every count thereof fails to charge any offense under the laws of the United States.

130 2. The indictment and each and every count thereof fails to charge an unlawful combination and conspiracy in restraint of trade and commerce among the several states of the United States, in violation of Section 1 of the Act of Congress of July 2, 1890, entitled "An Act to protect trade and commerce against unlawful restraints and monopolies."

3. The indictment and each and every count thereof shows on its face that the fluid milk, which is the subject matter of the alleged acts in restraint of trade, was not and did not constitute commerce

among the several states at the various times it is alleged to be in said indictment and each and every count thereof.

4. The indictment and each and every count thereof, other than by way of conclusion of the pleader, fails to allege sufficient facts which will justify this court in saying that, as a matter of law, the acts therein complained of constituted an unlawful combination and conspiracy in restraint of trade and commerce among the several states of the United States, in violation of Section 1 of the Act of Congress of July 2, 1890, entitled "An Act to protect trade and commerce against unlawful restraints and monopolies."

5. Counts 2 and 3 of the indictment show that the acts and things therein alleged and complained of relate to an affect only an article, namely, fluid milk, which was then the subject of local distribution within the City of Chicago, and therefore was not and could not then be trade or commerce among the several states as contemplated by

Section 1 of the Act of Congress of July 2, 1890, entitled "An 131 Act to protect trade and commerce against unlawful restraints and monopolies."

6. Count 3 of the indictment fails to allege any facts relating to an article or thing, and particularly fluid milk, which is or was the subject of trade or commerce among the several states, as contemplated by Section 1 of the Act of congress of July 2, 1890, entitled "An Act to protect trade and commerce against unlawful restraints and monopolies," at and during the time of the commission of the acts therein alleged and complained of.

7. The indictment and each and every count thereof shows that the alleged unlawful combination and conspiracy is based upon an alleged concerted plan and agreement between the defendant, Pure Milk Association, and other defendants therein named; wherefore, said indictment and each and every count thereof fails to charge any offense as defined by Section 1 of the Act of Congress of July 2, 1890, entitled "An Act to protect trade and commerce against unlawful restraints and monopolies," or any other Act of Congress, for the reason that said Pure Milk Association was and is specifically authorized by an Act of Congress, namely, Section 291, Title 7, U. S. C., commonly known as the Capper-Volstead Act to enter into such agreements.

8. The indictment and each and every count thereof shows that the alleged unlawful combination and conspiracy is based upon an alleged contract by and between the defendant, Pure Milk Association, and each of the defendant major distributors; wherefore, said indictment and each and every count thereof fails to charge any offense as defined by Section 1 of the Act of Congress of July 2, 1890, entitled "An 132 Act to protect trade and commerce against unlawful restraints and monopolies," or any other Act of Congress, for the reason that said Pure Milk Association was and is specifically authorized by an Act of Congress, namely, Section 291, Title 7, U. S. C., commonly known as the Capper-Volstead Act to enter into such agreements.

9. The indictment and each and every count thereof shows this defendant's only connection with the alleged combination and con-

spiracy to have been his actions as an arbitrator in certain arbitration proceedings between the defendant, Pure Milk Association, and the defendant's major distributors, wherein a certain dispute with respect to the price provisions that were contained in the alleged agreements between said defendants was arbitrated; wherefore, said indictment and each and every count thereof fails to charge any offense against this defendant as defined by Section 1, Title 15, of the Act of Congress of July 2, 1890, entitled "An Act to protect trade and commerce against unlawful restraints and monopolies," or any other Act of Congress, for the reason that said Pure Milk Association was and is specifically authorized by an Act of Congress, namely, Section 291, Title 7, U. S. C., commonly known as the Capper-Volstead Act to enter into such agreements.

10. The indictment and each and every count thereof shows that the alleged acts and things therein complained of are subject only to a complaint by the Secretary of Agriculture of the United States, who is directed and authorized by the statute in such case made and provided, namely, an Act of Congress commonly known as the Capper-Volstead Act, being Section 291, Title 7, U. S. C., to take such action and such action only as therein directed in reference to the alleged acts and things complained of in the indictment herein and in each and every count thereof.

133 11. Nowhere in said indictment, or in any count thereof, it is charged that this defendant did knowingly combine and conspire with any other defendant therein named, or with any other person to the Grand Jurors unknown, to do any act in violation of the laws of the United States, and particularly Section 1 of the Act of Congress of July 2, 1890, entitled "An Act to protect trade and commerce against unlawful restraints and monopolies."

12. Count 2 of the indictment alleges no facts to substantiate the conclusions of the pleader that the actions of this defendant did in fact fix and determine the prices paid by all persons who purchased fluid milk from distributors in the City of Chicago, and that such prices were arbitrary and noncompetitive.

13. No act is charged in the indictment or any count thereof as to this defendant having a tendency to effect the object of the conspiracy charged.

14. No act is charged in the indictment or any count thereof having a tendency to effect the object of the conspiracy charged.

15. There is no causal connection between the means and methods alleged to have been intended to effect and which are alleged did effect the combination and conspiracy charged in the indictment or any count thereof.

16. There is no causal connection between the acts alleged and the conspiracy charged in the indictment, or any count thereof.

134 17. The indictment, and each and every count thereof, attempts to charge an offense against the laws of the United States by charging acts which relate to trade and commerce solely within the State of Illinois, and over which this court has no juris-

diction and which is not an offense against the laws of the United States.

18. The indictment, and each and every count thereof, fails to allege acts relating solely to trade and commerce among the several states.

19. The indictment, and each and every count thereof, shows no intent to restrain trade and commerce among the several states.

20. The indictment, and each and every count thereof, fails to charge an offense in respect to an article of trade and commerce among the several states.

21. The indictment, and each and every count thereof, fails to inform this defendant of the nature and character of the offense with which he is charged in such manner and with such detail as will identify the same so that a verdict and judgment thereon could be pleaded as a bar to any subsequent prosecution for the same offense.

22. Section I of the Act of Congress of July 2, 1890, entitled "An Act to protect trade and commerce against unlawful restraints and monopolies," has been so amended, altered, modified, and restricted by the Act of Congress of February 18, 1922, entitled "An Act to authorize association of producers of agricultural products," commonly known as the "Capper-Volstead Act," as to deny to

135 this defendant due process of law and equal protection of the laws in contravention of the Fifth Amendment of the Constitution of the United States of America; that is to say,

(a) Said Act of July 2, 1890, as amended, altered, modified, and restricted as aforesaid arbitrarily and unreasonably discriminates between certain producers and associations of producers of agricultural products and other persons, including this defendant, and other associations, with respect to the definition, prohibition, and punishment of monopolies and restraints of trade in interstate trade and commerce.

(b) Said Act of July 2, 1890, as amended, altered, modified, and restricted as aforesaid arbitrarily and unreasonably discriminates between certain producers and associations of producers of agricultural products and all other persons, including this defendant, and other associations, by legalizing certain monopolies and restraints of interstate trade and commerce by such producers which are forbidden if intended or accomplished by others.

23. The allegations of Count Four of said indictment do not show that this defendant has engaged in an unlawful combination or conspiracy in restraint of trade or commerce among the several states of the United States, that is to say,

136 (a) It appears from the said allegations that the object and effect of the said supposed combination and conspiracy therein alleged was the adoption of the base-surplus plan, and it does not appear that the base-surplus plan is or was an unlawful or unreasonable restraint of trade or commerce.

(b) It appears from the allegations of the indictment that the alleged restraint and control complained of in Count Four was and

is restraint and control of production and not restraint or control of commerce among the several states.

(c) It does not appear by the allegations of said Count that the base-surplus plan limits or restraints either the production of milk or trade and commerce among the several states.

25. None of the counts of said indictment cites facts showing that this defendant has engaged in an unlawful combination or conspiracy in restraint of trade or commerce among the several states of the United States, that is to say,

(a) The first paragraph of each count which undertakes to describe the supposed combination and conspiracy therein alleged does not state facts showing that the matters and things therein complained of are or were an undue or unreasonable restraint of interstate trade or commerce.

(b) The means by which said supposed combinations and conspiracies were intended to be effected, are not stated in said indictment or in any count thereof.

137 (c) It does not appear from the allegations of said counts or of any of them that the objects or purposes of said supposed combinations and conspiracies or of any of them were intended to be accomplished by any means which would effect an undue or unreasonable restraint of interstate trade or commerce.

26. The alleged conspiracy set forth in the indictment and each and every count thereof relates to a subject matter which is not justiciable but is removed from the criminal jurisdiction of this Court, in that the Congress of the United States in its plenary power, as the legislative department of the Federal Government, has legislated to remove the subject matter of each count from the purview of Section 1 of the Act of Congress of July 2, 1890, entitled "An Act to protect trade and commerce against unlawful restraints and monopolies" and to devolve upon the Executive Department of the Federal Government power to regulate said subject matter by administrative action.

27. The indictment and each and every count thereof in setting forth said alleged conspiracy shows by the application of the doctrine of judicial notice that the alleged conspiracy in each count set forth expired and ended on March 2, 1935, and that the subject matter set forth as constituting the alleged conspiracy so terminated on March 2, 1935, was in fact commanded to be done by the United States of America.

28. The indictment and each and every count thereof charges acts, the substance of which is just as consistent with the hypothesis of innocence as with that of guilt.

138 29. The indictment and each and every count thereof shows that uniform terms and conditions for the purchase of all fluid milk purchased through the defendant, Pure Milk Association, had already been fixed, determined, and agreed upon prior to the time that this defendant is alleged to have acted as an arbitrator and to have thereby fixed and determined said prices.

30. The indictment and each and every count thereof joins several separate, independent, disconnected, unrelated, and subordinate alleged conspiracies.

31. The indictment and each and every count thereof charges an offense which is barred by the Statute of Limitations.

32. The indictment and each and every count thereof is void in that it was returned without authority of law at the October Term of this Court in the year 1938 by a Grand Jury, impaneled and sworn at the July Term of said Court in the year 1938 and illegally sitting during said October Term, that is to say,

(a) The orders of August 31, 1938, and September 27, 1938, purporting to authorize the said Grand Jury to sit, respectively, during the September and October 1938 Terms of this Court, do not find or disclose that this indictment was the result of an investigation begun but not finished during said July Term or that any investigation was begun but not finished during said July 1938 Term of this Court.

139 (b) The indictment does not show that the investigations alleged to have been begun but not finished during the July 1938 Term of this Court were not completed in the September 1938 Term of this Court.

33. Because certain defects are specified herein, it is not intended that any other defects, omissions, or imperfections are waived, and the same are hereby insisted upon with like effect, as if the same were herein specifically set forth and alleged.

LELAND SPENCER,

*Defendant.*

(Signed) ISHAM, LINCOLN & BEALE,

By (Signed) BEN H. MATTHEWS & JAMES P. DILLIE,

*His Attorneys.*

140 In United States District Court

[Title omitted.]

*Motion to quash*

Filed January 7, 1939

Now comes the defendant, Leland Spencer, by Isham, Lincoln & Beale, his attorneys, and moves the Court to quash the indictment and each and every count thereof returned against him in the above-entitled cause, for the following reason:

The indictment and each and every count thereof is void in that it was returned without authority of law at the October Term of this Court in the year 1938 by a Grand Jury, impaneled and sworn at the July Term of said Court in the year 1938 and illegally sitting during said October Term, that is to say,

(a) The orders of August 31, 1938, and September 27, 1938, purporting to authorize the said Grand Jury to sit, respectively, during the September and October 1938 Terms of this Court, do not find or disclose that this indictment was the result of an investigation

141 begun but not finished during said July Term or that any investigation was begun but not finished during said July 1938 Term of this Court.

(b) The indictment does not show that the investigations alleged to have been begun but not finished during the July 1938 Term of this Court were not completed in the September 1938 Term of this Court.

Wherefore, this defendant prays judgment that said indictment, and each and every count thereof, be quashed, and that he be dismissed and discharged therefrom.

LELAND SPENCER,  
*Defendant.*

ISHAM, LINCOLN & BEALE,

(Signed) By BEN H. MATTHEWS & JAMES H. DILLIE,  
*His Attorneys.*

143 In United States District Court

[Title omitted.]

*Notice*

To Hon. WILLIAM J. CAMPBELL,  
*United States Attorney.*  
*United States Court House, Chicago, Illinois, and*  
LEO F. TIERNEY, Esq.,  
*Special Assistant Attorney General.*  
*208 South LaSalle Street, Chicago, Illinois.*

You and each of you will please take notice that on Friday, July 28, 1939, at the opening of court in the forenoon, or as soon thereafter as counsel may be heard, I shall appear before the Honorable Charles E. Woodward, Judge of the United States District Court, in the room usually occupied by him as a court room in the United States Court House, at Chicago, Illinois, or before any other judge who may be sitting in his place and stead, and shall then and there present the written motion of the defendants, Herman N. Bundesen, Paul Krueger, and William J. Guerin (a copy of which motion and a copy of the demurser mentioned therein being attached hereto and herewith served upon you); and shall then and there make such other and further motions in the premises as may be necessary to obtain the relief sought; at which time and place you may be present if you so desire.

(Signed) CHARLES F. RATHBUN,  
*Attorney for above-named defendants.*

Received a copy of the above and foregoing Notice, together with a copy of the Motion and Demurrer therein mentioned, this 27th day of July 1939.

(Signed) WILLIAM J. CAMPBELL,  
*United States Attorney.*

(Signed) LEO F. TIERNEY,  
*Special Assistant Attorney General.*

144 In United States District Court

[Title omitted.]

*Motion for leave to withdraw pleas of not guilty*

Filed July 28, 1939

Now come the defendants, Herman N. Bundesen, Paul Krueger, and William J. Guerin, by Charles F. Rathbun, their attorney, and jointly and severally move the court for leave to withdraw their several pleas of not guilty heretofore entered to the indictment in the above-entitled cause; and further move the court for leave to file herein instanter the joint and several demurrers of the defendants, Herman N. Bundesen, Paul Krueger, and William J. Guerin to said indictment.

(Signed) CHARLES F. RATHBUN,  
Attorney for said defendants.

145 In United States District Court

[Title omitted.]

*Joint and several demurber of the defendants, Herman N. Bundesen, Paul Krueger, and William J. Guerin, to the indictment herein*

Filed July 28, 1939

The defendants, Herman N. Bundesen, Paul Krueger, and William J. Guerin, by Charles F. Rathbun, their attorney, jointly and severally come and demur to the said indictment, and each count thereof, and say that the same is not sufficient in law for them, or either of them, to plead unto, for the following reasons:

1. The indictment, and each count thereof, fails to state facts showing the commission of any offense over which the court has jurisdiction.
2. The indictment, and each count thereof, fails to state facts showing an unlawful combination and conspiracy in restraint of trade and commerce in fluid milk among the said several states of the United States, in violation of section 1 of the Act of Congress of July 2, 1890, entitled "An Act to protect trade and commerce against unlawful restraints and monopolies."
3. The alleged conspiracy set forth in each count of the indictment does not show facts sufficient to bring it within the purview of any statute of the United States of America.
4. The alleged conspiracy, set forth in the indictment, and each count thereof, relates to matters entirely within the jurisdiction of

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the laws of the State of Illinois and not within the inhibition of any laws of the United States.

5. The alleged conspiracy set forth in the indictment, and each count thereof, relates to a subject matter that is not justiciable, but is removed from the criminal jurisdiction of this court in that the Congress of the United States, in its plenary power as the legislative department of the federal government, has legislated to remove the subject matter of each count from the purview of section 1 of the Sherman Act and to devolve upon the executive department of the federal government power to regulate said subject matter by administrative action.

6. The indictment, and each count thereof, in setting forth said alleged conspiracy, shows by the application of the doctrine of judicial notice that the alleged conspiracy in each count set forth expired and ended on March 2, 1935, and that the subject matter set forth as constituting the alleged conspiracy so terminated on March 2, 1935, was in fact commanded to be done by the United States of America.

147 7. The indictment, and each count thereof, is fatally defective in that there is no showing of fact as to relation of these defendants, or either of them, to the other co-defendants named therein to connect them, or either of them, with the alleged conspiracy.

8. The indictment, and each count thereof, is fatally duplicitous.

9. The indictment, in each count thereof, joins several separate, independent, disconnected, unrelated, and subordinate alleged conspiracies.

10. There is misjoinder of counts.

11. The indictment, and each count thereof, is vague, indefinite, uncertain, ambiguous; and the allegations are not direct, certain, and positive, but are set up by way of conclusions, argumentative inferences, and epithets.

12. The allegations of the indictment, and each count thereof, are inconsistent with and repugnant to each other.

13. The allegations of the indictment, and each count thereof, are so vague, indefinite, and uncertain as to fail to apprise these defendants, or either of them, of the nature of the charge against them, or either of them.

148 14. The indictment, and each count thereof, is barred by the statute of limitations.

15. By the presentation of specific objections, these defendants, or either of them, do not intend to waive the general objections herein contained, or any other objections not herein enumerated, to any count or counts of said indictment.

(Signed) CHARLES F. RATHBUN,  
Attorney for said defendants.

[Title omitted.]

*Order granting leave to withdraw pleas of not guilty, etc.*

July 28, 1939

This cause coming on to be heard upon the motion of the defendants, Herman N. Bundesen, Paul Krueger, and William J. Guerin, by Charles F. Rathbun, their attorney, for leave to withdraw their several pleas of not guilty heretofore entered to the indictment in the above entitled cause, and for leave to file herein instanter their joint and several demurrers, due notice of the pendency of said motion having been given, the court having heard arguments of counsel and being fully advised in the premises,

It is ordered, that leave be and it hereby is granted to the defendants, Herman N. Bundesen, Paul Krueger, and William J. Guerin, to withdraw their several pleas of not guilty heretofore entered to the indictment in the above entitled cause; and

It is further ordered that leave be and it hereby is granted to the defendants, Herman N. Bundesen, Paul Krueger, and William J. Guerin, to file herein instanter their joint and several demurrers to the indictment herein.

Enter:

(Signed) CHARLES E. WOODWARD,  
Judge.

Dated: July 28, 1939.

[Title omitted.]

*Order allowing appeal to the Supreme Court of the United States*

Filed August 17, 1939.

This cause having come on this day before the Court on the petition of the United States of America, petitioner herein, praying for the allowance of an appeal to the Supreme Court of the United States for a reversal of the order and judgment herein dismissing the indictment as to all defendants and sustaining certain of the demurrers, motions to quash and special pleas in bar interposed by the defendants, The Borden Company, H. W. Comfort, S. M. Ross, Charles L. Dressel, Harry M. Reser, W. A. Baril, O. O. Smaha, R. W. Nessler, F. A. Webb, W. A. Wentworth, Bowman Dairy Company, D. B. Peck, Francis H. Kullman, Jr., M. J. Metzger, H. T. Adamson, J. F. Philippi, Hunding Dairy Company, Carl W. Hunding, Capitol Dairy Company, Hyman I. Freed, Sidney Wanzer & Sons, Inc., H. Stanley Wanzer, Gordon B. Wanzer, International

Dairy Company, Louis Janata, Western-United Dairy Company, Western Dairy Company, Inc., United Dairy Company, Louis G. Glick, Maurice S. Dick, Samuel S. Dick, Milk Dealers Bottle Exchange, Associated Milk Dealers, Inc., Paul Potter, Otto Black, Milk Wagon Drivers' Union, Local 753, International Brotherhood 153 of Teamsters, Chauffeurs, Stablemen, and Helpers of America, Robert G. Fitchie, James G. Kennedy, Steve C. Sumner, Fred C. Dahms, F. Ray Bryant, John O'Connor, David A. Riskind, Leslie G. Goudie, Daniel A. Gilbert, Pure Milk Association, Don N. Geyer, Edward F. Cooke, E. E. Houghtby, F. J. Knox, Lowell D. Oranger, John P. Case, Leland Spencer, Hermair N. Bundesen, Paul Krueger, and William Guerin to the first, second, third, and fourth counts in the indictment in said cause, and that a duly certified copy of the record of said cause be transmitted to the Clerk of the Supreme Court of the United States, and the Court having heard and considered said motion, together with petitioner's statement showing the basis of the jurisdiction of the Supreme Court to entertain an appeal in said cause, the same having been duly filed with the Clerk of this Court, it is therefore, by the Court,

Ordered and adjudged that the United States of America be and it is hereby allowed an appeal from the order and judgment of this Court sustaining the demurrers and motions of the defendants to quash the indictment and the special pleas in bar, and dismissing the indictment as to all defendants, to the Supreme Court of the United States, and that a duly certified copy of the record of said cause be transmitted to the Clerk of the Supreme Court, and that a citation be issued as provided by law.

It is further ordered that the United States of America be and it is hereby permitted a period of forty days from the date hereof in which to file and docket said appeal in the Supreme Court of the United States.

Dated at Chicago, Illinois, this 17th day of August 1939.  
By the Court:

CHARLES E. WOODWARD,  
*District Judge.*

154 In United States District Court

[Title omitted.]

*Petition for appeal*

Filed August 17, 1939

Comes now the United States of America, plaintiff herein, and states that on the 28th day of July, 1939, demurrers and motions to quash interposed by the defendants The Borden Company, H. W. Comfort, S. M. Ross, Charles L. Dressel, Harry M. Reser, W. A. Baril, O. O. Smaha, R. W. Nessler, F. A. Webb, W. A. Wentworth, Bowman Dairy

Company, D. B. Peck, Francis H. Kullman, Jr., M. J. Metzger, H. T. Adamson, J. F. Philippi, Hunding Dairy Company, Carl W. Hunding, Capitol Dairy Company, Hyman I. Freed, Sidney Wanzer & Sons, Inc., H. Stanley Wanzer, Gordon B. Wanzer, International Dairy Company, Louis Janata, Western-United Dairy Company, Western Dairy Company, Inc., United Dairy Company, Louis G. Glick, Maurice S. Dick, Samuel S. Dick, Milk Dealers Bottling Exchange, Associated Milk Dealers, Inc., Paul Potter, Otto Black, Milk Wagon Drivers' Union, Local 753, International Brotherhood of Teamsters, Chauffeurs, Stablemen and Helpers of America, Robert G. Fitchie, James G. Kennedy, Steve C. Sumner, Fred C. Dahms, F. Ray Bryant, John O'Connor, David A. Riskind, Leslie G. Goudie, Daniel A. Gilbert, Pure Milk Association, Don N. Geyer, Edward F. Cooke, E. E. Houghtby, R. J. Knox, Lowell D. Oranger, John P. Case, Leland Spencer, Herman N. Bundesen, Paul Krueger, and William Guerin to each and every count of the indictment herein were by the Court sustained, and the plaintiff feeling aggrieved at the ruling of said District Court in sustaining said demurrs and motions to quash, as to the first, second, third, and fourth counts, prays that it may be allowed to appeal to the Supreme Court of the United States for a reversal of said judgment and order in so far as it sustains the demurrs and motions to quash of the defendants to the first, second, third, and fourth counts of the indictment, and that a Transcript of the Record in this cause duly authenticated may be sent to said Supreme Court of the United States.

Petitioner submits and presents to the Court herewith a statement showing the basis of the jurisdiction of the Supreme Court to entertain an appeal in said cause

(Signed) LEO F. TIERNEY,  
Leo F. Tierney,

*Special Assistant to the Attorney General.*

(Signed) WILLIAM J. CAMPBELL,  
William J. Campbell,

*United States Attorney,  
Northern District of Illinois, Eastern Division.*

[Title omitted.]

*Assignment of errors*

Filed August 17, 1939

Now comes the United States of America, having heretofore filed its petition for appeal herein, and says that as a result of the action taken by this Court in sustaining the several demurrs and motions to quash filed against the indictment in this cause as to Counts One, Two, Three, and Four and, in effect, sustaining special pleas in bar of prosecution under the said indictment and in entering judgment there-

on in favor of the defendants on said demurrers, motions to quash and special pleas, there has intervened manifest and prejudicial error to the prejudice of the United States of America in the above entitled cause. The said errors so intervening are enumerated as follows, to wit:

1. The Court committed material error against the plaintiff in sustaining the various joint and several demurrers, motions to quash, and special pleas of the defendants The Borden Company, H. W. Comfort, S. M. Ross, Charles L. Dressel, Harry M. Reser, W. A. Baril, O. O. Smaha, R. W. Nessler, F. A. Webb, W. A. Wentworth, Bowman Dairy Company, D. B. Peck, Francis H. Kullman, Jr., M. J. Metzger, H. T. Adamson, J. F. Philippi, Hunding Dairy Company, Carl W. 158 Hunding, Capitol Dairy Company, Hyman I. Freed, Sidney Wanzer & Sons, Inc., H. Stanley Wanzer, Gordon B. Wanzer, International Dairy Company, Louis Janata, Western-United Dairy Company, Western Dairy Company, Inc., United Dairy Company, Louis G. Glick, Maurice S. Dick, Samuel S. Dick, Milk Dealers Bottle Exchange, Associated Milk Dealers, Inc., Paul Potter, Otto Black, Milk Wagon Drivers' Union, Local 753, International Brotherhood of Teamsters, Chauffeurs, Stablemen and Helpers of America, Robert G. Fitchie, James G. Kennedy, Steve C. Sumner, Fred C. Dahms, F. Ray Bryant, John O'Connor, David A. Riskind, Leslie G. Goudie, Daniel A. Gilbert, Pure Milk Association, Don N. Geyer, Edward F. Cooke, E. E. Houghtby, F. J. Knox, Lowell D. Oranger, John P. Case, Leland Spencer, Herman N. Bundesen, Paul Krueger, and William Guerin interposed to the first, second, third, and fourth counts of the indictment in the above entitled cause.

2. The Court committed material error against the plaintiff in sustaining said demurrers, motions to quash, and special pleas interposed to the first, second, and fourth counts of the indictment in the above entitled cause, on the ground that no indictment will lie under Section 1 of the Sherman Act, c. 647, 26 Stat. 209, Title 15, U. S. C., Section 1, with respect to the production and marketing of agricultural products, including milk, because the production and marketing of agricultural products, including milk, are removed from the purview of the Sherman Act by the Agricultural Adjustment Act of May 12, 1933, c. 25, 48 Stat. 31, Title 7, U. S. C., Section 601, as amended August 24, 1935, c. 641, 49 Stat. 750, Title 7, U. S. C., Section 601, and as reenacted and amended by the Agricultural Marketing Agreement Act of June 3, 1937, c. 296, 50 Stat. 246, Title 7, U. S. C., Supp. IV, Par. 601 et seq.

3. The Court committed material error against the plaintiff in sustaining the joint and several demurrers and special pleas of the defendants Pure Milk Association, Don N. Geyer, Edward F. 159. Cooke, E. E. Houghtby, F. J. Knox, Dowell D. Oranger, and John P. Case which were interposed as to Counts One, Two, Three, and Four of the indictment in the above entitled cause, on the ground that no indictment will lie under Section 1 of the Sherman Act, c. 647, 26 Stat. 209, Title 15, U. S. C., Section 1, with respect to the production and marketing of agricultural products, including milk, because Section 6 of the Clayton Act, c. 323, 38 Stat. 730, Title 15,

U. S. C., Section 17, Sections 1 and 2 of the Capper-Volstead Act, c. 57, 42 Stat. 388, Title 7, U. S. C., Section 291, and the Agricultural Adjustment Act of May 12, 1933, c. 25, 48 Stat. 31, Title 7, U. S. C., Section 601, as amended August 24, 1935, c. 641, 49 Stat. 750, Title 7, U. S. C. Section 601, and as reenacted and amended by the Agricultural Marketing Agreement Act of June 3, 1937, c. 296, 50 Stat. 246, Title 7, U. S. C., Supp. IV, Par. 601, et seq., when properly construed, exempt the Pure Milk Association, an agricultural cooperative association, together with its officers and agents, from prosecution under Section 1 of the Sherman Act.

4. The Court committed material error against the plaintiff in dismissing Counts One, Two, Three, and Four of the indictment in the above entitled cause as to all of the defendants.

Wherefore, the United States of America respectfully prays that the action taken by said Court in sustaining the said demurrers, motions to quash and special pleas filed by the defendants against the indictment herein as to Counts One, Two, Three, and Four and the ruling of the Court in entering judgment in favor of the defendants on said demurrers, motions to quash, and special pleas be set aside and held for naught.

(Signed) LEO F. TIERNEY,  
Leo F. Tierney,

*Special Assistant to the Attorney General.*

(Signed) WILLIAM J. CAMPBELL,  
William J. Campbell,

*United States Attorney,  
Northern District of Illinois, Eastern Division.*

166 In United States District Court, Northern District of Illinois,  
Eastern Division

No. 31197

UNITED STATES OF AMERICA

v.

THE BORDEN COMPANY ET AL.

*Opinion*

Filed July 13, 1939

WOODWARD, District Judge: This matter comes up on the several demurrers and motions to quash an indictment in four counts, charging fourteen corporations and associations and forty-three individuals with engaging in an unlawful combination and conspiracy in restraint of interstate commerce in fluid milk in violation of Section 1 of the Sherman Act (15 U. S. C. A. 1).

The averments of the indictment may be condensed and summarized as follows:

The city of Chicago, Illinois, has a population in excess of three and one-half million people. In excess of a million quarts of fluid milk are distributed and sold each day in the city of Chicago. The production of milk destined for ultimate distribution and sale as fluid milk in the city of Chicago, its transportation to the city, its preparation for distribution and sale within the city, and its distribution and sale within the city, are regulated by an ordinance 167 of the city of Chicago and by rules and regulations promulgated by the Board of Health. Under the ordinance and under the regulations of the Board of Health, fluid milk distributed and sold in the city of Chicago must be produced on a dairy farm approved by the Board of Health. Such dairy farm is known as an approved dairy farm.

In the states of Illinois, Indiana, Michigan, and Wisconsin there are more than fifteen thousand approved dairy farms. More than fifty per cent of the approved dairy farms are located in states other than Illinois. Of the fluid milk produced on approved dairy farms, approximately forty per cent is produced on approved dairy farms in Indiana, Michigan, and Wisconsin.

Fluid milk produced on approved dairy farms is transported to Chicago in two ways:

(a) From approved dairy farms to country stations where it is commingled and combined with fluid milk from other approved dairy farms and thereafter transported from the country stations to Chicago by motor vehicle or by railroad; and

(b) Directly from approved farms by motor vehicle.

Fluid milk by its nature is perishable. It cannot be stored and it must reach the consumer within a short time after its production.

Pursuant to the ordinance of the city of Chicago and to the 168 rules and regulations of the Board of Health, all fluid milk transported to Chicago for sale and distribution therein must be delivered daily to a place, premise, or establishment where milk is collected preparatory to pasteurization elsewhere, or to a pasteurization plant where milk is handled or otherwise prepared for distribution and sale as fluid milk.

More than one hundred twenty-five distributors, some of whom are made defendants under the designation "major distributors," purchase fluid milk from producers for distribution and sale in the city of Chicago. The major distributors commingle the fluid milk from Indiana, Michigan, and Wisconsin, with milk produced in Illinois and then sell the commingled milk in Chicago as one product.

The individual defendants, except a police officer of the city of Chicago, the officers of the Chicago Board of Health, and two arbitrators, are associated with or employed by the corporation and association defendants.

Each of the major distributors is an Illinois corporation engaged in the sale and distribution of fluid milk in the city of Chicago. Approximately sixty-five per cent of the fluid milk sold in the city of Chicago is sold by the major distributors. All major distributors

maintain country stations in states outside of Illinois, receive fluid milk at such country stations, and transport it to Chicago.

169 The Associated Milk Dealers, Inc. is an Illinois corporation. Substantially all the members of the Associated Milk Dealers, Inc. are distributors doing business in the city of Chicago. The major distributors dominate and control its activities.

The Pure Milk Association is a corporation organized under "The Cooperative Marketing Act" of Illinois. It has a membership in excess of twelve thousand producers, approximately fifty per cent of whom are located outside of Illinois.

It is constituted the sole and exclusive agent for marketing the milk of its members. In excess of eighty per cent of the milk produced by its members is produced on approved dairy farms, seventy-five per cent of which is purchased by the major distributors.

The Milk Dealers Bottle Exchange is an Illinois Corporation. The major distributors own in excess of eighty per cent of its outstanding capital stock and dominate and control its activities and business. It is engaged in collecting, exchanging, and distributing milk bottles, cans, and other containers used by distributors. Special discounts are allowed to stockholders which are not allowed to non-stockholders on charges for services rendered.

170 The Milk Wagon Drivers Union, Local 753, International Brotherhood of Teamsters, Chauffeurs, Stablemen and Helpers of America is a voluntary unincorporated association and is affiliated with the American Federation of Labor. Its members are employed by distributors in connection with the distribution and sale of fluid milk in the city of Chicago. Approximately seventy-five per cent of all its employed members are employed by the major distributors.

Daniel A. Gilbert is a public officer of the city of Chicago.

The officers of the Board of Health are charged with the administration of the milk ordinance of the city of Chicago and the rules and regulations promulgated thereunder.

The two arbitrators were members of an arbitration board which arbitrated a dispute between the major distributors and the Pure Milk Association.

The indictment charges that commencing in the month of January 1935, and continuously thereafter until the presentation of the indictment, the defendants engaged in an unlawful conspiracy in restraint of trade and commerce in fluid milk among the several states.

#### COUNT ONE

Count one charges a conspiracy—"to arbitrarily fix, maintain, and control artificial and non-competitive prices to be paid to all producers by all distributors for all fluid milk produced on approved dairy farms located in the states of Illinois, Indiana, Michigan, and Wisconsin," and shipped to Chicago.

171 The means and methods whereby the conspiracy was intended to be effected are set forth at length. It is necessary to state only the general scheme. The major distributors, the Pure Milk Association and the Associated Milk Dealers, fixed and agreed upon uniform terms and conditions for the purchase of fluid milk from the Pure Milk Association, including price provisions. Through price letters and a monthly periodical, the Pure Milk Association fixed the prices to be paid for fluid milk by all independent distributors to independent producers. The arbitrator defendants sat on a board of arbitration which arbitrated a dispute between the Pure Milk Association and the major distributors. The Bottle Exchange discriminated against distributors who refused to purchase fluid milk at the prices thus fixed. Local 753, its adviser and the police officer, by threats, intimidation, and acts of violence interfered with the business of independent distributors. The Board of Health defendants gave preferential treatment to member-producers and discriminated against independent producers.

The gravamen of the offense charged in this count is the fixing, maintaining, and controlling of prices to be paid fluid milk producers.

#### COUNT Two

Count two charges a conspiracy—

172 "to fix and maintain by common and concerted action, uniform, arbitrary, and noncompetitive prices for the sale by the distributors in the city of Chicago of fluid milk shipped into the said City from the states of Illinois, Indiana, Michigan, and Wisconsin."

Again the means and methods are set forth at length. The major distributors, the Pure Milk Association and the Associated Milk Dealers, agreed and fixed upon uniform, arbitrary, and noncompetitive prices to be exacted from and paid to the purchasers of fluid milk. This agreement was executed by the major distributors. Its effect was to compel independent distributors to exact a like price from their customers. The Pure Milk Association refused to sell fluid milk to distributors who would not maintain the fixed price. Substantially the same allegation is made as to the arbitrator defendants as is made in Count one. The Bottle Exchange discriminated against distributors who refused to maintain the fixed price. Local 753, its adviser and the police officer, interfered by threats, intimidation, and violence with independent distributors not conforming to the fixed price standard. The Board of Health defendants gave preferential treatment to producers who sold to distributors maintaining the fixed prices and imposed unreasonable burdens on distributors who refused conformity.

The gravamen of the offense charged in this count is the fixing and maintaining of prices at which fluid milk is sold in Chicago.

Count three charges a conspiracy

(a) "to hinder and to prevent prospective and independent distributors from engaging in the business of distributing fluid milk in the city of Chicago;

(b) "to hinder and to prevent existing independent distributors from distributing fluid milk in the city of Chicago in competition with the major distributors;

(c) "to hinder and to prevent the distribution of fluid milk to stores and by stores in the city of Chicago; and

(d) "to hinder and to prevent any distribution of fluid milk in the city of Chicago, except by the method and in the manner determined by said defendants."

Likewise the means and methods are set forth somewhat at length. The major distributors refrained from competing with each other for customer accounts; refused a stop served by any other distributor unless allowed to serve such stop exclusively; and by means of cash payments, loans, gifts, special discounts, and other securities obtained the privilege of serving stops exclusively. The Associated Milk Dealers adopted and enforced a rule requiring independent distributors to refrain from taking stops of major distributors. The Pure Milk Association refused to sell fluid milk to independent distributors who attempted to take the stops of major distributors and did other things to hinder the business of independent distributors. The arbitrator defendants rendered the arbitration award hereinbefore referred to. The Milk Dealers Bottle Exchange delayed the return of bottles of independent distributors and refused to sell independent distributors corporate stock. Local 753, its adviser

174 and the police officer, by a series of threats, coercion, and violence hindered and delayed independent distributors in their business of distributing fluid milk in the city of Chicago. The Board of Health defendants, acting arbitrarily, imposed onerous burdens on the distribution of fluid milk in the city of Chicago by independent distributors.

The gravamen of the offense charged in this count is the determination and control of the distribution of fluid milk in Chicago.

#### COUNT FOUR

Count four charges a conspiracy—

"to restrict, limit, and control and to restrain and obstruct the supply of fluid milk moving in the channels of interstate commerce into the city of Chicago from the states of Illinois, Indiana, Michigan, and Wisconsin."

As in the other counts means and methods whereby the conspiracy charged as to be effected are set forth. The Pure Milk Association enforced a base surplus plan of production by which it limited the total production of fluid milk by member producers and did other

incidental acts to enforce the base surplus plan. The major distributors entered into agreements with the Pure Milk Association whereby the base surplus plan might be effected. The arbitrator defendants did the acts hereinbefore referred to. The Associated Milk Dealers acted in concert with the Pure Milk Association to enforce the 175 base surplus plan. The Bottle Exchange delayed and refused to return milk bottles and containers to independent distributors who refused to sell their milk through the Pure Milk Association. Local 753, their adviser and the police officer, by threats, intimidation, and coercive measures, exerted their influence against independent distributors to carry out the base surplus plan. The Board of Health defendants gave preferential treatment and imposed arbitrary burdens upon independent producers. The count further states that "the said base-surplus plan of payment was intended to and does restrict, limit, and control, restrain, and obstruct the supply of fluid milk entering the city of Chicago by arbitrarily limiting the quantity of fluid milk for which a member-producer may be paid at base price."

The gravamen of the offense charged in this count is the control of the supply of fluid milk permitted to be brought to Chicago.

As ground for motion to quash the indictment, most of the defendants contend that the indictment having been returned at the October 1938 term of court, was returned by an illegal and invalid grand jury.

The facts upon which this contention is made are as follows:

The terms for the District Court of this Division are fixed by statute to be held on the first Mondays in February, March, April, May, June, July, September, October, and November, and the third Monday in December (28 U. S. C. A. 152).

176 The grand jury that returned the indictment was impaneled and sworn at the July 1938 term of this court. On August 31, 1938, the grand jury appeared as a body in open court before Judge Woodward and presented a petition praying for an order authorizing the grand jury to sit during the September Term

"to finish investigations begun but not finished by the said July 1938 grand jury and which said investigation cannot be finished during the said July 1938 grand jury term of court."

On the same day Judge Woodward entered an order, based upon such petition, authorizing the July 1938 grand jury

"to sit during the September Term for the purpose of finishing said investigations."

Near the close of the September 1938 term it became apparent to the grand jury that they could not complete their labors during that term, the grand jury appeared as a body in open court before Judge Wilkerson praying for an order authorizing them to sit during the October 1938 term. Acting on that petition Judge Wilkerson, during the September Term, entered an order authorizing the grand jury

"to continue to sit during the October 1938 term of court for the purpose of finishing said investigations."

The applicable statute reads as follows:

"A district judge may, upon request of the district attorney  
177 or of the grand jury or on his own motion, by order authorize  
any grand jury to continue to sit during the term succeeding  
the term at which such request is made solely to finish investiga-  
tions begun but not finished by such grand jury, but no grand jury  
shall be permitted to sit in all during more than three terms" (28  
U. S. C. A. 421).

Under the authority of this statute the grand jury can sit for a total of three terms of court. The limitations upon this right are that (a) a grand jury can be continued beyond its original term solely to finish investigations begun but not finished during the term for which it was authorized to sit, and (b) the continuance granted by the court can be only for one term at a time. The petitions and orders are clearly within the statute. The grand jury was a lawful grand jury and had full authority to return the indictment in this case.

Some hyper-critical objections are made as to the form of the order, but these objections are without merit.

The motion to quash the purported service of process upon Borden-Wieland, Inc., must be allowed. It appears that a corporation known as Borden-Wieland, Inc., was organized under the laws of Delaware. On January 4, 1936, Borden-Wieland, Inc., together with other corporations, was merged into a corporation known as Borden's Dairy Products Company, Inc. Thereafter all of the assets of Borden's

Dairy Products Company, Inc., were transferred to The  
178 Borden Company, a New Jersey Corporation. On February  
11, 1936, Borden's Dairy Products Company, Inc., was dissolved. Borden's Dairy Products Company, Inc., is not a defendant. The merger was effected under the corporation law of Delaware which, by Section 60, provides in part:

"When an agreement shall have been signed, acknowledged, filed and recorded \* \* \* for all purposes of the laws of the State, the separate existence of all the constituent corporations parties to said agreement, or all of such constituent corporations except the one into which the other or others of such constituent corporations have been merged, as the case may be, shall cease \* \* \*."

The effect of this section of the act is to terminate the separate existence of all the constituent merging corporations, except the one into which they have been merged. *Title Guaranty Loan & Trust Co. v. Alabama By-Products Corp.*, 214 Ala. 486; *Geeser v. Phoenix Finance Co.*, 218 La. 1112.

Under this statute the existence of Borden-Wieland, Inc., was terminated on the date of the merger, namely, January 4, 1936. The corporate existence of Borden-Wieland, Inc., having ceased on January 4, 1936, this court cannot obtain jurisdiction over it by service of process on its purported assistant secretary.

Counts I, II, and IV may be considered together. These counts deal with the relationship between the producer and distributor of fluid milk. That relationship is the only basis upon which the government predicates the theory that interstate commerce in fluid milk exists whereby a conspiracy under the Sherman Act may be charged. In substance these counts charge that the defendants engaged in a combination and conspiracy to restrain trade and commerce in fluid milk among the several states (1) by fixing and maintaining prices to be paid to producers; (2) by fixing and maintaining prices to be charged by distributors to consumers; and (3) by restraining, limiting, and controlling the supply of fluid milk moving in interstate commerce by means of what is known as the base surplus plan. Price fixing is the essence of these counts.

179 The basic act is the Sherman Act under which this prosecution is sought to be maintained. The Sherman Act forbids noncompetitive control of prices in interstate commerce, without regard to the desirability of price stability, or the intent of the parties, or the benefit to the public, or the reasonableness of the price fixed.

The Sherman Act has been in force nearly fifty years. During that time sweeping changes in the nation's social and economic problems have been wrought. These changing social and economic problems are reflected in the statute law, both national and state. The Sherman Act embodies the philosophy of individualism and unrestrained competition. Statutory law, since the enactment of the Sherman Act, reflects a change in the fundamental concept on which the Sherman Act is based. The tendency of later legislation has embodied the philosophy of collectivism and control of harmful competition. 180 With the relative wisdom of these essentially incompatible philosophies, the courts have no concern. It is the duty, and concern of the courts to construe and apply the applicable constitutional enactments of the political branch of the government.

The first act which makes a departure from, or an exception to, the Sherman Act was the Clayton Act of October 15, 1914 (15 U. S. C. A. 17). By that act labor, agricultural or horticultural cooperative organizations were excepted from the broad and sweeping terms of the Sherman Act. Such cooperative organizations, in and of themselves, were not to be construed as illegal combinations or conspiracies in restraint of trade under the antitrust laws.

The next radical departure from the theory of the Sherman Act was the Capper-Volstead Act of February 18, 1922 (7 U. S. C. A. 291). This act legalizes price fixing for those within its purview. To that extent it modifies the Sherman Act. It removes from the Sherman Act those organizations, cooperative in their nature, which come within the purview of the Capper-Volstead Act. Prior to the Capper-Volstead Act farmers were treated no differently than others under the antitrust laws, so far as price fixing was concerned.

This act goes much further than section 6 of the Clayton Act. It is much broader in scope. The Capper-Volstead Act legitimizes, for agricultural cooperative associations, specified powers and purposes. It provides that associations, qualified

under its terms, may process, prepare for market, handle and market in interstate and foreign commerce the products of their members; that they may have marketing agencies in common and that they may make the necessary contracts and agreements to carry out such purposes.

Section 2 (7 U. S. C. A. 292) recognizes that cooperative associations, in the exercise of the powers conferred upon them by section 1, may monopolize or restrain interstate trade. It confers upon the Secretary of Agriculture the power, after complaint, notice, and hearing, to issue a "cease and desist" order when he finds that "the price of any agricultural product is unduly enhanced by reason" of such association monopolizing or restraining trade in interstate or foreign commerce.

The Capper-Voistead Act does not condemn any kind of monopoly or restraint of trade, or any price fixing, unless such monopoly or price fixing unduly enhances the price of an agricultural product. The Act then, by section 2 thereof, commits to an officer of the executive department, the Secretary of Agriculture, the power of regulation and visitation.

Under this act farmers are favored under the antitrust laws in that they are given a qualified right, free from any criminal liability, to combine among themselves to monopolize and restrain interstate trade and commerce in farm products and to fix and enhance the price thereof.

182. This is the first statute to which the attention of the court has been called which, with reference to farmer's cooperatives, embodies the theory of executive regulation and control of price of profit. The theory and philosophy of unrestrained competition is departed from and, in its stead, is substituted the theory of governmental regulation of combinations and prices. The control is vested in the Secretary of Agriculture, subject, however, under Section 2, to review by the courts. The court deduces from the Capper-Voistead Act that the Secretary of Agriculture has exclusive jurisdiction to determine and order, in the first instance, whether or not farmer cooperatives, in their operation, monopolize and restrain interstate trade and commerce

"to such an extent that the price of any agricultural product is unduly enhanced."

Until the Secretary of Agriculture acts, the judicial power cannot be invoked.

The Cooperative Marketing Act of July 2, 1926 (7 U. S. C. A. 453), in this connection, is not of particular significance. It was probably declaratory of the law as it existed in that cooperative organizations were authorized to control and disseminate crop, marketing, statistical, and economic information. However, it does show a closer and more intimate contact with the government in that the government through the Farm Credit Administration in the Department of Agriculture was created for the purpose of acting as a clearing house for cooperatives.

183 The Agricultural Adjustment Act of May 12, 1933, known as A. A. A. (48 Stat. 31; 7 U. S. C. A. 601 et seq.), together with its amendment of August 24, 1935 (c. 641, 49 Stat. 750), and the Agricultural Marketing Agreement Act of June 3, 1937 (Ch. 296, 50 Stat. 246) witnessed the most marked departure from the theory of the Sherman Act.

The Agricultural Adjustment Act of 1933, in some of its material features, was held invalid in the case of United States v. Butler, 297 U. S. 1. The decision in this case affected only the production control and the processing-tax provisions of the act of 1933. The act of 1933, as amended in 1935, contained provisions relative to the marketing of agricultural products. The decision in the Butler case, *supra*, cast some doubt on the validity of the marketing provisions of the several acts. To cure the infirmities, if any, in the marketing provisions of the Agricultural Adjustment Act, the Congress enacted into separate legislation the marketing and order provisions of the Agricultural Adjustment Act. The Congress, therefore, by the act of June 3, 1937, enacted the Agricultural Marketing Agreement Act (Ch. 296, 50 Stat., p. 246). It reenacted, affirmed, and validated, without material change, the provisions of the Agricultural Adjustment Act, as amended, relating to marketing agreements and orders. The Agricultural Marketing Agreement Act has been held valid in the cases of U. S. v. Rock Royal Co-Operative, Inc., and H. P.

184 Hood & Sons, Inc., v. U. S. et al., by opinions of the Supreme Court handed down June 5, 1939.

The original Agricultural Adjustment Act (48 Stat. 31) was passed by Congress to relieve the then economic depression in the basic industry of agriculture. The act was preceded by a declaration of emergency in which it was recited that the normal currents of commerce in agricultural commodities have been burdened and obstructed by the severe disparity between the prices of agricultural commodities and the prices of industrial products, which disparity has resulted in the substantial destruction of the purchasing power of farmers for industrial products and the breaking down of the orderly exchange of all commodities. It therefore declared that "these conditions in the basic industry of agriculture have affected transactions in agricultural commodities with a national public interest."

The Agricultural Marketing Agreement Act (7 U. S. C. A. 601) makes substantially the same declaration, namely, that transactions in agricultural commodities affect "a national public interest." The Congress then proceeds, by the purview of the act which follows the declaration of emergency, to remedy this deplorable condition. The act provides in detail how the "national public interest" in transactions affecting agricultural commodities shall be conserved, protected, and advanced.

Following the declaration of emergency and a statement of the conditions confronting agriculture and industry, the policy 185 which was intended to be effected, the end to be accomplished, is stated clearly and succinctly:

"To establish and maintain such orderly marketing conditions for agricultural commodities in interstate commerce as will establish prices to farmers at a level that will give agricultural commodities a purchasing power with respect to articles that farmers buy, equivalent to the purchasing power of agricultural commodities in the base period" (7 U. S. C. A. 602 (1)).

Another declared policy was that of protecting the interest of the consumer by

"approaching the level of prices which it is declared to be the policy of Congress to establish in subsection (2) of this section by gradual correction of the current level at as rapid a rate as the Secretary of Agriculture deems to be in the public interest and feasible in view of the current consumptive decline in domestic and foreign markets \* \* \*" (7 U. S. C. A. 602 (2)).

The declared policy of Congress, therefore, was directed towards the protection and stabilization of transactions in agricultural commodities. In construing and applying the Agricultural Adjustment Act, as amended, and the Agricultural Marketing Agreement Act, the policy of Congress, as stated both in the declaration of emergency and in the declaration of policy, must constantly be borne in mind.

This express policy of the Congress was intended to be put into practical execution. Its practical execution was to be had 186 "through the exercise of the powers conferred upon the Secretary of Agriculture under this chapter" (7 U. S. C. A. 602 (1)).

The base period for agricultural commodities, with exceptions not here material

"shall be the pre-war period, August 1909—July 1914" (7 U. S. C. A. 602 (1)).

In order to execute the declared policy of the act, the Secretary of Agriculture is vested with power to enter into marketing agreements. The statute reads:

"In order to effectuate the declared policy of this title, the Secretary of Agriculture shall have the power, after due notice and opportunity for hearing, to enter into marketing agreements with processors, producers, associations of producers, and others engaged in the handling of any agricultural commodity or product thereof, only with respect to such handling as is in the current of interstate or foreign commerce or which directly burdens, obstructs, or affects, interstate or foreign commerce in such commodity or product thereof. The making of any such agreement shall not be held to be in violation of any of the antitrust laws of the United States, and any such agreement shall be deemed to be lawful \* \* \*" (7 U. S. C. A. 608b).

Not only is the Secretary of Agriculture vested with power to enter into marketing agreements with producers and handlers, but also he is charged with the mandatory duty, under given circumstances, to enter orders (7 U. S. C. A. 608c (1)).

The statute reads:

"The Secretary of Agriculture shall, subject to the provisions  
187 of this section, issue, and from time to time amend, orders  
applicable to processors, associations of producers, and others  
engaged in the handling of any agricultural commodity or product  
thereof specified in subsection (2) of this section" (7 U. S. C. A.  
608c (1)).

Among other commodities to which orders "shall be applicable," is  
milk (7 U. S. C. A. 608c (2)).

It will be noted that the Secretary of Agriculture is empowered  
to enter into marketing agreements, but that he is required to enter  
orders (7 U. S. C. A. 608b and 608c (1)).

The object of the order is that of regulation of the handling of  
agricultural commodities which are in interstate commerce. Again, a  
mandatory duty is imposed on the Secretary of Agriculture. The  
statute says that the "orders shall regulate," the limitation being that  
the orders shall apply only to interstate or foreign commerce. The  
statute reads:

"Such orders shall regulate, in the manner hereinafter in this section  
provided, only such handling of such agricultural commodity,  
or product thereof, as is in the current of interstate or foreign com-  
merce, or which directly burdens, obstructs, or affects, interstate or  
foreign commerce in such commodity or product thereof." (7  
U. S. C. A. 608c (1)).

Before an order can be issued, preliminary steps must be taken.  
There must be notice and an opportunity for a hearing (7 U. S. C. A.  
608c (3)). There must be a finding by the Secretary of Agriculture,  
based upon evidence introduced at such hearing,

188 "that the issuance of such order and all the terms and condi-  
tions thereof will tend to effectuate the declared policy of this  
chapter with respect to such commodity \* \* \*" (7 U. S. C. A.  
608c (4)).

Where an order is issued with a marketing agreement, it does not  
become effective until the handlers of not less than fifty percent of  
the volume of the commodity within the area of the order have  
signed the marketing agreement, and does not become effective until  
approved by at least two-thirds of the producers by number, or by  
producers who have produced for market at least two-thirds of the  
volume of such commodity (7 U. S. C. A. 608c (8)). The approval  
by a cooperative agency is considered the approval of its members  
(7 U. S. C. A. 608c (12)). However, an order may become effective  
notwithstanding its disapproval by the handlers if the Secretary of  
Agriculture, with the approval of the President, determines (1) that  
the failure of the handlers to sign the marketing agreement  
"tends to prevent the effectuation of the declared policy of this  
chapter with respect to such commodity or product";

(2) that the issuing of such order is the only practical means of advancing the interests of the producers of such commodity and is approved or favored (a) by two-thirds of the producers, or (b) by producers who have produced two-thirds of the volume of the commodity (7 U. S. C. A. 608c (9) (A) (B)).

189 If a handler feels that an order is not in accordance with law, he is entitled, on petition, to a hearing by the Secretary of Agriculture, after which the Secretary of Agriculture must make a ruling

"which shall be final, if in accordance with law" (7 U. S. C. A. 608c (15) (A)).

This order is subject to judicial review (7 U. S. C. A. 608c (16) (B)).

Orders are required to contain one or more of the following terms and conditions: (1) prohibiting unfair methods of competition and unfair trade practices, (2) providing for the selection of an agency which shall have the power (a) to administer the order; (b) to make rules and regulations to carry out the order; (c) to investigate complaints or violations, and (d) to recommend amendments (7 U. S. C. A. 608c (7)).

In the case of milk and its products, special terms and conditions must be contained in the order. These terms and conditions are set forth quite at length. A recital of such terms and conditions is not pertinent to the inquiry before this court, and hence the court contents itself with a mere reference to the statute (7 U. S. C. A. 608c (5)).

Jurisdiction is given to the District Court "to enforce, and to prevent and restrain any person from violating any order, regulation, or agreement, heretofore or hereafter made or issued pursuant to this chapter" (7 U. S. C. A. 608a (6)).

190 Provision is also made for a criminal prosecution against a handler who violates the provision of any order (7 U. S. C. A. 608c (14)).

Provision is further made whereby the Secretary of Agriculture may terminate or suspend the operation of an order. The wording of the statute is

"The Secretary of Agriculture shall, whenever he finds that any order issued under this section, or any provision thereof, obstructs or does not tend to effectuate the declared policy of this title, terminate or suspend the operation of such order or such provision thereof (7 U. S. C. A. 608c (16) (A)).

Section 611 (7 U. S. C. A. 611) declares the conditions upon which any product shall be excluded from the operations of the law. In order to remove the marketing of any such agricultural products from the operations of the law, the Secretary must first institute an investigation. He must give notice and an opportunity for interested parties to be heard. If, after such investigation, notice, and hearing, he concludes that the conditions of production, mat-

keting, and consumption are such that, during any period, the law cannot be effectively administered to the end of effectuating the declared policy with respect to such commodity, then

"the Secretary of Agriculture shall exclude from the operation of the provisions of this chapter, during any period, any such commodity \* \* \*."

This section contains the only provision whereby the marketing 191 of any basic agricultural commodity, including milk, may be exempted from the jurisdiction and control of the Secretary of Agriculture. Until the Secretary invokes the power of investigation, notice, and hearing, conferred upon him by this section, the basic agricultural commodity, so far as the marketing thereof is concerned, remains where the statute puts it, namely, in the Secretary of Agriculture.

The Agricultural Marketing Agreement Act was designed to improve the marketing of agricultural products, including milk, under the supervision and regulation of the Department of Agriculture. The act is wider in content than the Capper-Volstead Act. It extends to both distributors and producers. It placed both producers and distributors of agricultural products, including milk, under the exclusive control of the Secretary of Agriculture.

Vast powers were conferred upon the Secretary of Agriculture with relation to the production, distribution, and marketing of agricultural products, including milk. The theory of the act is to improve the condition of agriculture throughout the United States under the supervision, direction, and regulation of the Secretary of Agriculture. To attain this end powers commensurate with his duty and responsibility are vested in the Secretary. Under the Agricultural Marketing Agreement Act of June 3, 1937, the Secretary of Agriculture is vested with full and plenary power to enter into marketing agreements with both the producers, handlers, and distributors of agricultural products.

A study of the statutory policy from the Sherman Act of 1890 to the Agricultural Marketing Agreement Act of 1937 shows a constant and growing tendency on the part of Congress to control and regulate the production and marketing of agricultural products; including milk, through the administrative agency of the Secretary of Agriculture. The whole theory and policy of the Agricultural Marketing Agreement Act is that of governmental control, regulation, and supervision. The production and marketing of agricultural products, including milk, has, so far as interstate commerce is concerned, been removed from the sphere of trade and barter in a free agency to a status of dependence and obedience to the supreme, exclusive, and plenary control of the Secretary of Agriculture, subject to judicial review in the mode prescribed by the statute.

The Court holds that, by the Agricultural Marketing Agreement Act the Congress has committed to the Executive Department, acting

through the Secretary of Agriculture, full, complete, and plenary power over the production and marketing, in interstate commerce, of agricultural products, including milk.

193 To what extent he should act, the quantum of regulation, is solely one for his judgment and decision. If conditions require, he must act; if they do not require action, then all marketing conditions are deemed satisfactory and the purpose of the act is effectuated. Nonaction by the Secretary of Agriculture, in any given marketing area, is equivalent to a declaration that the policy of the act, in that area, is being carried out. If the policy of the act, in any given milk area, is being violated it becomes the duty of the Secretary of Agriculture to intervene and invoke the powers conferred upon him by the act.

It results, from what has been said, that the power of regulation, supervision, and control of the milk industry, in any given milk shed, is, by the Agricultural Marketing Agreement Act of 1937, vested exclusively in the Secretary of Agriculture. It follows further that the Secretary of Agriculture cannot by his own action, or inaction, divest himself of this power so long as the statute remains in force. The marketing of the agricultural products, including milk, covered by the Agricultural Marketing Agreement Act, is removed from the purview of the Sherman Act. In other words, so far as the marketing of agricultural commodities, including milk, is concerned, no indictment will lie under section 1 of the Sherman Act.

194 The question of whether or not the indictment charges that the combination and conspiracy restrained trade and commerce in fluid milk among the several states has been extensively and ably argued on both sides, the government contending that the averments of the indictment plainly charge a combination and conspiracy in restraint of interstate commerce and the defendants contending that the indictment, properly analyzed and considered, fails to charge a combination and conspiracy in restraint of interstate commerce. It will be perceived, however, from what has been stated, that as to Counts one, two, and four of the indictment it is unnecessary to decide whether or not the allegations of the indictment show that interstate commerce was or was not restrained. If the marketing of milk in the Chicago milk shed burdens, obstructs, or affects interstate commerce in fluid milk, then, as above concluded, the merchandising thereof was subject to the plenary and exclusive control of the Secretary of Agriculture through marketing agreements or orders made pursuant to the Agricultural Marketing Agreement Act. If, on the other hand, the acts charged in the indictment do not burden, obstruct, or affect interstate commerce in fluid milk, then plainly no offense under the Sherman Act has been charged under Counts one, two, and four.

195 The demurrs to Counts one, two, and four must, therefore, be sustained.

The averments of Count three have hereinbefore been set forth.

This count charges at least four separate, different, and independent conspiracies or combinations. This is not a case of one conspiracy accomplished by several acts; it is several independent conspiracies. Each of the conspiracies affects different individuals or affects the same individuals in entirely different situations.

It is one thing to hinder and prevent prospective independent distributors from engaging in the business of distributing fluid milk. It is entirely different to hinder and prevent existing independent distributors from distributing fluid milk in Chicago in competition with the major distributors. To hinder and prevent distribution of fluid milk to stores and by stores in the city of Chicago is different from any conspiracy previously charged in this count. To hinder and prevent any distribution of fluid milk in the city of Chicago, except by the method and in the manner determined by said defendants, is also conspiracy sharply differentiated from the three conspiracies previously charged in this indictment.

This count is challenged as bad for duplicity. The Court believes the challenge to be well taken and holds that the count charges at least four distinct and separate conspiracies, and not a single conspiracy.

196 Moreover, this count deals with "independent distributors" and stores. It is also challenged on the ground that the supposed restraints therein described do not affect any interstate commerce. The indictment alleges generally the origin of fluid milk transported into Chicago from Illinois, Indiana, Michigan, and Wisconsin. It further alleges that all the major distributors have country stations outside of Illinois and transport, or cause to be transported, milk received in such stations to Chicago. The indictment is lacking as to averments or allegations as to the origin of fluid milk sold by stores or independent distributors. It is only by intendment and inference that the Court could conclude from an examination of the indictment that the conspiracy charged in Count three had any effect on interstate commerce. It is only by such intendment and inference that the Court could conclude that the stores and independent distributors whose system of distribution the defendants are alleged to have controlled, sold fluid milk which was or had been the subject of interstate commerce. It is a fundamental of criminal pleading that an indictment must allege directly and with certainty every essential element or ingredient of the offense. If any essential element or ingredient of the crime is omitted, such omission cannot be supplied by intendment or implication. (Pettibone v. U. S., 148 U. S. 197; U. S. v. Carney, 228 Fed. 163.)

The demurrer to Count three, therefore, must be sustained.

114 UNITED STATES VS. THE BORDEN COMPANY ET AL.

198 In United States District Court for the Northern District of Illinois, Eastern Division

No. 31197

UNITED STATES OF AMERICA, PLAINTIFF,

vs.

THE BORDEN COMPANY ET AL., DEFENDANTS

*Order and judgment on demurrers and motions to quash filed by the several defendants, as shown of record*

July 28, 1939

An indictment in the above-entitled cause having been returned by a grand jury in the District Court of the United States of America for the Northern District of Illinois, Eastern Division, on November 1, 1938, charging each of the defendants hereinafter named with a violation of Title 15, U. S. C. A., Section 1, entitled "An Act to protect trade and commerce against unlawful restraints and monopolies," and the defendant Borden-Wieland, Inc., having moved to quash service of summons, and the defendants The Borden Company, H. W. Comfort, S. M. Ross, Charles L. Dressel, Harry M. Reser, W. A. Baril, O. O. Smaha, R. W. Nessler, F. A. Webb, and W. A. Wentworth, having jointly and severally demurred to and moved to quash the said indictment, and the defendants Bowman Dairy Company, D. B. Peck, Francis H. Kullman, Jr., M. J. Metzger, H. T. Adamson, and J. F. Philippi having demurred to the said indictment, and the defendants Hunding Dairy Company and Carl W. Hunding having demurred to and moved to quash the said indictment, and the defendants Capital Dairy Company and Hyman I. Freed having demurred to and moved to quash the said indictment, and the defendant Sidney Wanzer & Sons, Inc., having demurred to the said indictment, and the defendant H. Stanley Wanzer having demurred to the said indictment and the defendant Gordon B. Wanzer having demurred to the said indictment, and the defendant International Dairy Company having demurred to the said indictment, and the defendant Louis Janata having demurred to the said indictment, and the defendant Western-United Dairy Company having demurred to the said indictment, and the defendant Western Dairy Company, Inc., having demurred to the said indictment, and the defendant United Dairy Company having demurred to the said indictment, and the defendant Louis G. Glick having demurred to the said indictment, and the defendant Maurice S. Dick having demurred to the said indictment, and the defendant Samuel S. Dick having demurred to the said indictment; and the defendant Milk Dealers Bottle Exchange having demurred to the said indictment, and the defendants Associated Milk Dealers, Inc., Paul Potter, and Otto Black having jointly and

severally demurred to and moved to quash the said indictment, and the defendants Milk Wagon Driver's Union, Local 753, International Brotherhood of Teamsters, Chauffeurs, Stablemen, and Helpers of America, Robert G. Fitchie, James G. Kennedy, Steve C. Sumner, Fred C. Dahms, F. Ray Bryant, John O'Connor, and David A. Riskind having demurred to the said indictment, and the defendant Leslie G. Goudie having demurred to and moved to quash the said indictment, and the defendant Daniel A. Gilbert having demurred to the said indictment, and the defendants Pure Milk Association, Don N. Geyer, Edward F. Cooke, E. E. Houghtby, F. J. Knox, Lowell D. Oranger, and John P. Case having demurred to and moved to quash the said indictment, and the defendant Leland Spencer having demurred to and moved to quash the said indictment, and the defendants Herman N. Bundesen, Paul Krueger, and William Guerin having demurred to said indictment, and each of the above-named defendants having filed written briefs and points of authorities on the various legal questions involved, and this matter having come on regularly to be heard on June 7 and 8, 1939,

201 at the regular term of the District Court of the United States of America for the Northern District of Illinois, Eastern Division.

Now, after hearing the oral arguments of counsel for the several defendants in support of said motions to quash and demurrers, and the oral argument of Leo F. Tierney, Esquire, Special Assistant to the Attorney General, in opposition thereto, and being fully advised in the premises, the Court finds that certain objections made to the indictment are well taken and should be sustained.

Accordingly, it is hereby ordered and adjudged:

First, that paragraph 5 of each of the separate demurrers of the defendants Sidney Wanzer & Sons, Inc., H. Stanley Wanzer, Gordon B. Wanzer, International Dairy Company, Louis Janata, Western-United Dairy Company, Western Dairy Company, Inc., United Dairy Company, Louis G. Glick, Maurice S. Dick, Samuel S. Dick, and Milk Dealers Bottle Exchange, and that paragraph 26 of the separate demurrrer of the defendant Leland Spencer, and that paragraph 14 of the joint and several demurrers and motion to quash of the defendants Associated Milk Dealers, Inc., Paul Potter, and

202 Otto Black, and that paragraph 5 of the separate demurrers of the defendants Herman N. Bundesen, Paul Krueger, and William Guerin, be, and the same hereby are, sustained as to Counts One, Two, and Four of the above mentioned indictment on the ground that no indictment will lie under Section 1 of the Sherman Act, Title 15, U. S. C. A., Section 1 (Act of July 2, 1890, 26 Stat. 209), with respect to the production and marketing of agricultural products, including milk, because the production and marketing of agricultural products are removed from the purview of the Sherman Act of 1890, Title 15, U. S. C. A., Section 1 (Act of July 2, 1890, 26 Stat. 209), by the Act of May 12, 1933 (48 Stat. 31), as amended August

24, 1935 (49 Stat. 750, and as reenacted and amended by the Agricultural Marketing Agreement Act of 1937 (50 Stat. 246), 7 U. S. C. A., Supp. IV, par. 601 et seq.

Second, that paragraph 10 of the joint and several demurrs of Pure Milk Association, Don N. Geyer, Edward F. Cooke, E. E. Houghtby, F. J. Knox, Lowell D. Oranger, and John P. Case, be, and the same hereby are, sustained as to Counts One, Two, Three, and Four of the above-mentioned indictment on the ground that no indictment will lie under Section 1 of the Sherman Act, Title

203 15, U. S. C. A., Section 1 (Act of July 2, 1890, 26 Stat. 209),

with respect to the production and marketing of agricultural products, including milk, because Section 6 of the Clayton Act (Act of October 15, 1914, 15 U. S. C. A. 17), Sections 1 and 2 of the Capper-Volstead Act (Act of February 15, 1922), 7 U. S. C. A., Section 291, and The Agricultural Adjustment Act of May 12, 1933 (48 Stat. 31), as amended August 24, 1935 (49 Stat. 750), and as reenacted and amended by the Agricultural Marketing Agreement Act of 1937 (50 Stat. 246), 7 U. S. C. A., Supp. IV, Par. 601 et seq. when properly construed exempt the Pure Milk Association, an agricultural co-operative association, together with its officers and agents, from prosecution under Section 1 of the Sherman Act of 1890 (Act of July 2, 1890, 26 Stat. 209).

Third, that paragraph 6 of the joint and several demurrer and motion to quash of the defendants The Borden Company, H. W. Comfort, S. M. Ross, Charles L. Dressel, Harry M. Reser, W. A. Baril, O. O. Smaha, R. W. Nessler, F. A. Webb, and W. A. Wentworth, and that paragraph 6 of the joint and several demurrer and motion to quash of the defendants Bowman Dairy Company,

204 D. B. Peck, Francis H. Kullman, Jr., M. J. Metzger, H. T. Adamson, and J. F. Philippi, and that paragraphs 8 and 9 of each of the separate demurrs of the defendants Sidney Wanzer & Sons, Inc., H. Stanley Wanzer, Gordon B. Wanzer, International Dairy Company, Louis Janata, Western United Dairy Company, Western Dairy Company, Inc., United Dairy Company, Louis G. Glick, Maurice S. Dick, Samuel S. Dick, and Milk Dealers Bottle Exchange, and that paragraphs 18 and 19 of the joint and several demurrs and motion to quash of the defendants Associated Milk Dealers, Inc., Paul Potter, and Otto Black, and that paragraph 1 of the joint and several dehurrer of the defendants Milk Wagon Drivers' Union, Local 753, International Brotherhood of Teamsters, Chauffeurs, Stablemen and Helpers of America, Robert G. Fitchie, James G. Kennedy, Steve C. Sumner, Fred C. Dahms, F. Ray Bryant, John O'Connor, and David A. Riskind, and that paragraph 8 of the joint and several demurrer of Herman N. Bundesen, Paul Krueger, and William J. Guerin, and that paragraph 30 of the separate demurrer of the defendant Leland Spencer, be, and the same hereby are sustained as to Count Three of the above mentioned indictment on the ground that said Count charges at least four separate and distinct conspiracies and is therefore bad for duplicity;

205 Fourth, that paragraph 8 of the joint and several demurrer and motion to quash of the defendants The Borden Company, H. W. Comfort, S. M. Ross, Charles L. Dressel, Harry M. Reser, W. A. Baril, O. O. Smaha, R. W. Nessler, F. A. Webb, and W. A. Wentworth; and paragraph 8 (b) of the joint and several demurrer and motion to quash of the defendants Bowman Dairy Company, D. B. Peck, Francis H. Kullman, Jr., M. J. Metzger, H. T. Adamson, and J. F. Philippi, and paragraph 5 of the joint and several motion to quash and demurrer of the defendants Hunding Dairy Company and Carl W. Hunding, and paragraph 7 of the joint and several motion to quash and demurrer of the defendants Capitol Dairy Company and Hyman I. Freed, and paragraph 8 (a) and (b) of the joint and several demurrer and motion to quash of the defendants Associated Milk Dealers, Inc., Paul Potter and Otto Black, and paragraph D (6) of the joint and several demurrer of the defendants Milk Wagon Drivers' Union, Local 753, International Brotherhood of Teamsters, Chauffeurs, Stablemen and Helpers of America, Robert G. Fitchie, James G. Kennedy, Steve C. Sumner, Fred C. Dahms, F. Ray Bryant, John O'Connor, and David A. Riskind, and paragraph 5 of the separate demurrer and motion to quash of the  
206 defendant Leslie G. Goudie, and paragraph 6 of the separate demurrer of the defendant Daniel A. Gilbert, and paragraph 23 of the joint and several motion to quash and demurrer of the defendants Pure Milk Association, Don N. Geyer, Edward F. Cooke, E. E. Houghtby, F. J. Knox, Lowell D. Oranger, and John P. Case, and paragraph 6 of the separate demurrer of the defendant Leland Spencer, be, and the same hereby are, sustained as to Count Three on the ground that a restraint of interstate commerce is not definitely alleged in Count Three in that it is not definitely charged that the milk sold by stores and independent distributors was or had been the subject of interstate commerce;

Fifth, that the said motions to quash and demurrers be, and the same hereby are, overruled, pro forma:

(1) As to Counts One, Two, and Four, insofar as they challenge these Counts on the ground that interstate commerce was not involved;

(2) As to Counts One, Two, Three, and Four, insofar as they challenge the constitutionality of the Sherman Act of 1890, Title 15,  
U. S. C. A., Section 1;

207 (3) As to Counts One, Two, Three, and Four, insofar as they challenge the sufficiency of the allegation of unlawful conspiracy;

(4) As to Counts One, Two, Three, and Four, each and every other ground of demurrer and motion to quash filed by the defendants herein, not herein specifically overruled or sustained;

Sixth, that the said motion to quash the service of process upon Borden-Wieland, Inc., be, and the same hereby is granted on the ground that, under Section 60 of the Corporation Law of Delaware, Borden-Wieland, Inc., ceased to exist on January 4, 1936;

**118 UNITED STATES VS. THE BORDEN COMPANY ET AL.**

Seventh, that the several motions to quash the indictment herein upon the ground that the same was returned by an invalid and illegal grand jury are hereby overruled.

**208** It is therefore ordered that the service of process upon Borden-Wieland, Inc., be, and the same hereby is quashed and set aside;

It is therefore ordered that the indictment be, and the same hereby is dismissed as to all defendants.

It is further ordered that the opinion of the Court rendered and filed herein with the Clerk of the District Court of the United States of America for the Northern District of Illinois, Eastern Division, on the 13th day of July, 1939, be made a part of the record in this cause;

It is further ordered that the United States of America and the several defendants are hereby allowed exceptions to this order and decision in so far as they are respectively aggrieved thereby.

Done in open court this 28th day of July 1939.

(Signed) CHARLES E. WOODWARD,  
*District Judge.*

**211 In United States District Court**

Title omitted.

*Præcipe for transcript of record*

Filed August 17, 1939

*To The Clerk, United States District Court, Northern District of Illinois, Eastern Division:*

The appellant hereby directs that in preparing the transcript of the record in the above entitled cause for its appeal to the Supreme Court of the United States, you include the following:

1. Docket entries and minute entries showing return of indictment, filing of demurrers and motions to quash and entry of order and judgment sustaining demurrers and motions to quash.
2. Indictment.
3. Demurrers and motions to quash.
4. Opinion.
5. Order and judgment sustaining demurrers and motions to quash.
6. Petition for appeal to the Supreme Court of the United States.
7. Statement of jurisdiction of the Supreme Court of the United States.
8. Assignment of errors.
9. Order allowing appeal.
10. Proof of service on appellees of petition for appeal, order allowing appeal, assignment of errors and statement as to jurisdiction.

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## 11. Citation.

## 12. Praeipe.

(Signed) LEO F. TIERNEY,  
Leo F. Tierney,*Special Assistant to the Attorney General.*(Signed) WILLIAM J. CAMPBELL,  
William J. Campbell,*United States Attorney.**Northern District of Illinois, Eastern Division.*

214 [Citation in usual form filed August 17, 1939, omitted in printing.]

223 In United States District Court

[Title omitted.]

*Order denying motion for leave to amend appeal order*

August 28, 1939

This day comes the defendant Pure Milk Association et al. by its attorneys and enter their motion for leave to amend appeal order of August 17, A. D. 1939, by striking out "and Special Pleas in Bar" in first paragraph and also the same clause in the second paragraph, which motion is denied.

225 In United States District Court

[Title omitted.]

*Designation for additional portions of the record desired to be included by certain appellees*

Filed August 28, 1939

*To the clerk of the United States District Court, for the Northern District of Illinois, Eastern Division:*

Appellees, The Borden Company, H. W. Comfort, S. M. Ross, Charles L. Dressel, Harry M. Reser, W. A. Baril, O. O. Smith, R. W. Nessler, F. A. Webb, W. A. Wentworth, Bowman Dairy Company, D. B. Peck, Francis H. Kullman, Jr., M. J. Metzger, H. T. Adamson, J. F. Philippi, Hunding Dairy Company, Carl W. Hunding, Capitol Dairy Company, Hyman I. Freed, Pure Milk Association, Don N. Geyer, Edward F. Cooke, E. E. Houghtby, F. J. Knox, Lowell D. Oranger, John P. Case, Leland Spencer, hereby direct that you prepare a complete transcript of the record in said cause, including therein, without limitation, the following portions of said

record in addition to those specified in the praecipe filed August 1939, by appellant:

1. Motion of defendants, The Borden Company, et al., filed August 27, 1939, including notice of said motion.

2. Motion of Pure Milk Association, et al., filed August 28, 1939, including notice of said motion.

3. Order of the Court entered August 28, 1939, disposing of said motions.

4. Bill of exceptions or stenographic report of proceedings on the hearing on said motions before Judge Charles E. Woodward on August 28, 1939, attached hereto:

5. This designation of additional portions of the record and proof of service thereof.

(Signed) Frederic Birnham, Donald F. McPherson, Cecil I. Crouse, Howard Neitzert (Attorneys for The Borden Company, H. W. Comfort, S. M. Ross, Charles L. Dressel, Harry M. Reser, W. A. Baril, O. O. Smaha, R. W. Nessler, F. A. Webb, and W. A. Wentworth); (signed) Louis E. Hart, Irving Herriott, L. Edward Hart, Jr. (Attorneys for Bowman Dairy Company, D. B. Peck, Francis H. Kullman, Jr., M. J. Metzger, H. T. Adamson and J. F. Philippi); (signed) Charles S. Deneen, Roy Massena, Donald Schaffer (Attorneys for Hunding Dairy Company and Carl W. Hunding); (signed) Isadore Fried, Bernard A. Stol, Herbert B. Fried (Attorneys for Capitol Dairy Company and Hyman L. Freed); (signed) Schuyler & Hennessy, George Lennon, W. C. Graves & Martin Burns (Attorneys for Pure Milk Association, Don N. Geyer, Edward F. Cooke, E. E. Houghtby, F. J. Knox, Lowell D. Oranger, and John P. Case); (signed) Isham, Lincoln & Beale, Ben H. Matthews, James P. Dille (Attorney for Leland Spencer).

Received a copy of the above and foregoing designation for Additional Portions of the Record Desired to be Included by Certain Appellees this 28th day of August, A. D. 1939.

ROBERT H. JACKSON,  
By THOS. H. DALY,

LEO F. TIERNEY,

By THOS. H. DALY,

WILLIAM J. CAMPBELL,

U. S. Atty.

227 [Transcript of proceedings on motion to amend order of August 17, 1939, allowing appeal to the United States of America omitted. Printed side page, 277 post.]

245 In United States District Court

[Title omitted.]

*Notice*

To ROBERT H. JACKSON, Esquire,  
*Solicitor General;*  
LEO F. TIERNEY, Esquire,  
*Special Assistant to the Attorney General; and*  
WILLIAM J. CAMPBELL, Esquire,  
*United States Attorney.*

Please take notice that on Monday, the 28th day of August 1939, at 10:00 o'clock in the forenoon, or as soon thereafter as counsel may be heard, we shall appear before his Honor, Judge Woodward, in the room usually occupied by him as a courtroom in the United States Court House, in the City of Chicago, State of Illinois, and shall then and there present the motion of certain defendants, a copy of which motion is handed to you with this notice, at which time and place you may appear if you see fit.

Dated: August 25th, 1939.

MAYER, MEYER, AUSTRIAN & PLATT,  
SIDLEY, MCPHERSON, AUSTIN & BURGESS,  
MONTGOMERY, HART, PRITCHARD & HERIOTT,  
DENEEN AND MASSENA,  
ISIDORE FRIED,

*Attorneys for certain defendants.*

Received a copy of the above notice, together with a copy of the motion referred to therein, this 26th day of August, A. D. 1939.

(Signed) ROBERT H. JACKSON,  
(Signed) LEO F. TIERNEY,  
(Signed) WILLIAM J. CAMPBELL.

246 In United States District Court.

[Title omitted.]

*Motion to amend order of August 17, 1939.*

Filed August 28, 1939

Come now The Borden Company, Charles L. Dressel, Harry M. Reser, W. A. Baril, H. W. Comfort, S. M. Ross, O. O. Smaha, R. W. Nessler, F. A. Webb, W. A. Wentworth, Bowman Dairy Company, D. B. Peck, Francis H. Kullman, Jr., M. J. Metzger, H. T. Adamson, J. F. Philippi, Hunding Dairy Company, Carl W. Hunding, Capitol Dairy Company, and Hyman Freed, defendants in the above entitled cause, by their respective attorneys, and show to the Court:

1. That by the order made in this cause and dated the 17th day of August, 1939, it was ordered that an appeal be allowed to the United States of America from the order and judgment of this Court entered on July 28, 1939.

2. That said order of August 17, 1939, was entered ex parte by this Court and without notice to the defendants upon the petition of the United States of America.

3. That these defendants have been notified of the entry of the said order of August 17, 1939, and have duly examined such order and find that the same is erroneous in that it recites that certain special pleas in bar were filed by certain defendants and have been sus-

247 tained, and further that it grants to the United States of America an appeal from an order and judgment sustaining certain special pleas in bar, whereas, in fact, no such special pleas in bar were filed by any defendants and the order and judgment entered in this cause on, to-wit, July 28, 1939, did not so sustain any special pleas in bar.

Whereof, these defendants move the Court that the said order of August 17, 1939 may be amended in the following manner:

(a) By striking out the words, "and special pleas in bar," in the sixth line of the first paragraph of said original order, after the words, "motions to quash."

(b) By striking out the words, "and the special pleas in bar," in the fourth line of the second paragraph of the said original order, after the words, "and motions of the defendants to quash the indictment."

Dated August 25, 1939.

(signed) Donald F. McPherson, (signed) Frederic Burnham, (signed) Cecil I. Crouse, (Attorneys for The Borden Company, Charles L. Dressel, Harry M. Reser, W. A. Baril, H. W. Comfort, S. M. Ross, O. O. Smaha, R. W. Nessler, F. A. Webb, and W. A. Wentworth); (signed) Louis E. Hart, (signed) Irving Herriott, (signed) L. Edward Hart, Jr. (Attorneys for Bowman Dairy Company, D. B. Peck, Francis H. Kullman, Jr., M. J. Metzger, H. T. Adamson, and J. F. Philippi); (signed) Charles S. Deneen, (signed) Roy Massena, (signed) Donald N. Schaffer, (Attorneys for Hunding Dairy Company and Carl W. Hunding); (signed) Isidore Fried, (signed) Bernard A. Stol, (signed) Herbert B. Fried, (Attorneys for Capitol Dairy Company and Hyman Freed).

250 In United States District Court

[Title omitted.]

*Notice*

To Honorable WILLIAM J. CAMPBELL, *United States Attorney, Federal Building, Chicago, Illinois.*

Honorable LEO F. TIERNEY, *Special Asst. Attorney General, 208 South La Salle Street, Chicago, Illinois.*

Please take notice that on Monday, the 28th day of August, A. D. 1939, at the hour of ten o'clock A. M., or as soon thereafter as coun-

sel can be heard, the undersigned will appear before the Honorable Charles E. Woodward, Judge of the United States District Court, in the room usually occupied by him as a courtroom, in the United States Court House, at Chicago, Illinois, or before any other Judge who may be sitting in his place, and move the Court to amend the order of August 17, 1939, in accordance with our motion, copy of which is hereto attached.

SCHUYLER & HENNESSY.  
GEORGE W. LENNON.  
W. C. GRAVES.  
MARTIN BURNS.

CHICAGO, ILLINOIS, *August 25, 1939.*

Received a copy of the above and foregoing Notice this 26th day of August, A. D. 1939.

(Signed) WILLIAM J. CAMPBELL,  
*United States Attorney.*

(Signed) LEO F. TIERNEY,  
*Special Asst. Attorney General.*

251 In United States District Court

[Title omitted.]

*Notice to amend order of August 17, 1939*

Filed August 28, 1939

Come now Pure Milk Association, Don N. Geyer, Edward F. Cooke, E. E. Houghtby, F. J. Knox, Lowell D. Oranger, and John P. Case, defendants in the above entitled cause, each in their own proper person, by their undersigned attorneys, and show to the Court:

1. That by the order made in this cause and dated the 17th day of August 1939, it was ordered that an appeal be allowed to the United States of America from the order and judgment of this court entered on July 28, 1939.

2. Said order of August 17, 1939, was entered ex parte by this court and without notice to the defendants upon the petition of the United States of America.

3. Since the entry of said order of August 17, 1939, these defendants have discovered that there is an error in the said order in that it orders that an appeal be allowed to the United States of America from the order and judgment of this Court sustaining special pleas in bar interposed by the defendants, for the reason that the said order and judgment of this Court entered July 28, 1939, did not sustain any special pleas in bar interposed by the defendants in this cause.

Wherefore, these defendants move the Court that the said order of August 17, 1939, may be amended in the following manner:

**124 UNITED STATES VS. THE BORDEN COMPANY ET AL.**

**252** (a) By striking out the words, "and special pleas in bar," in the sixth line of the first paragraph of said original order, after the words, "motions to quash."

(b) By striking out the words, "and the special pleas in bar," in the fourth line of the second paragraph of the said original order, after the words, "and motions of the defendants to quash the indictment."

Dated August 25, 1939.

SCHUYLER E. HENNESSY.  
GEORGE W. LENNON.  
W. C. GRAVES.  
MARTIN BURNS.

**273 In United States District Court**

[Title omitted.]

*Order to strike from citation September 1, 1939*

This cause coming on to be heard upon the motion of F. A. Webb to strike from the citation heretofore issued herein the name "Borden-Wieland, Inc." and the Government being represented in open Court by its counsel, and the Court being fully advised,

It is hereby ordered that the name "Borden-Wieland, Inc." be stricken from the citation heretofore filed herein.

Dated at Chicago, Illinois, September 1, 1939.

Enter:

(Signed) CHARLES E. WOODWARD.

**275 In United States District Court**

[Title omitted.]

*Order to file bill of exceptions*

This cause coming on to be heard upon the motion of certain defendants to settle a Bill of Exceptions of proceedings held before Judge Charles E. Woodward on August 28, 1939, and the attorneys for the United States of America having been notified of such motion and being present in open Court; and the said Bill of Exceptions having been duly signed and certified by the Judge of this Court;

It is ordered that said Bill of Exceptions be filed of record in this cause.

Enter:

CHARLES E. WOODWARD, Judge.

Dated September 1, 1939.

## In United States District Court

[Title omitted.]

*Bill of exceptions*

Filed Sept. 1, 1939

MOTION TO AMEND ORDER OF AUGUST 17, 1939, ALLOWING APPEAL TO THE  
UNITED STATES OF AMERICA

Stenographic transcript of proceedings had in the above-entitled cause before the Honorable Charles E. Woodward, one of the Judges of said Court, on the 28th day of August, A. D. 1939, at the hour of ten o'clock A. M.

Present: Mr. Britt, Mr. Daly, Mr. Burnham, Mr. McPherson, Mr. Martin, Mr. Hart, Jr., Mr. Rathbun, Mr. Freed, Mr. Schaffer, Mr. Burns, Mr. Dillie, Mr. Graves, Mr. Thayer.

278 The CLERK. United States versus Borden et al. Motion to amend Order of August 17, 1939, allowing appeal to the United States of America.

Mr. BURNHAM. If your Honor please, on August 17th you granted an appeal, entering an order ex parte in this case, and this is a motion to amend that order by striking certain words therefrom.

The petition for appeal prayed for an appeal from the order sustaining certain demurrers and motions to quash, but the order entered by your Honor allows an appeal from an order sustaining demurrers, motions to quash, and special pleas in bar.

There are no special pleas in bar; and for that reason we are asking that the order be amended by striking—

The COURT. That affects only your one client; doesn't it?

Mr. BURNHAM. No, your Honor. It affects all. The situation is this, the civil—the criminal—

The COURT. I understand the Government contends that in effect the motion as to one of those defendants is a plea in bar.

Mr. BURNHAM. No.

279 Mr. BRITT. Yes, your Honor; that is the contention of the Government.

Mr. BURNHAM. The contention of the Government, as I understand it—

Mr. BRITT. I will state that, if you don't mind.

Mr. BURNHAM. Well, all right, do state it.

Mr. BRITT. The contention of the Government is that the motions and demurrers to quash are pleas, they are pleadings, and they are designated by the defendants as motions to quash and demurrers; but the effect of that is to bar a prosecution under the Sherman Act. That is, the order of the court states that by reason of the enactment of the Agricultural Adjustment Act that no indictment will lie under the Sherman Act.

Now, strictly speaking, that is not a construction of the Act upon which the indictment is founded, but rather a statement of the

application of it, and the Government is interested in it for this reason, that the Criminal Appeals Act has two paragraphs under which we may go to the Supreme Court of the United States. One is that there may be a direct appeal from the decision or judgment concerning the validity or construction of the statute upon which the indictment is founded. Now, there is a limitation in that 280. Section by which we do not care to be bound when the effect of the ruling is also to sustain a special plea in bar, which is taken care of under Section 682 of Title 18, and the Supreme Court has stated as recently as 1931, in *United States v. Murdock*, where Justice Butler said:

"If the effect of the judgment upon the plea for the defendant is to bar further prosecution for the offense charged, it is a 'special plea in bar' within the meaning of Title 18, U. S. C. A., Section 682, and it follows unquestionably that without regard to the particular designation or form of the plea or its propriety, the Supreme Court has jurisdiction under the Criminal Appeals Act."

Now, the fact that the defendant has called this a demurrer or special plea in bar or a motion to quash, if the effect of it is to sustain a special plea in bar, then the substance and not the form of the motion is what applies.

**The COURT.** There is only one special plea in bar here, that I remember at least.

**Mr. BURNHAM.** As a matter of fact, your Honor, there is none.

**The COURT.** That related to your client in Delaware.

281      **Mr. BURNHAM.** Borden-Wieland Company

**The COURT.** Borden-Wieland.

**Mr. BURNHAM.** The position just stated by Mr. Britt is exactly the way I understood the Government's position to be. They are contending that motions to quash and demurrers are in effect pleas in bar. That is what they are contending. Now, they may make—

**The COURT.** Really, Mr. Burnham, this court cannot settle that.

**Mr. BURNHAM.** No, your Honor; but you did. You say by the Order, because you stated in the order that you allowed an appeal from your order sustaining certain motions to quash, demurrers, and special pleas in bar. When they petitioned for the appeal they did not say they had any special pleas in bar from which they wished to appeal. They merely said they had certain motions to quash and demurrers from which they sought an appeal; but when they handed to you the order to sign, *ex parte*, they included in it an allowance of an appeal from motions to quash, demurrers, and special pleas in bar.

Now, the special pleas in bar which they claim are involved, the so-called special pleas in bar, are nothing more than demurrers and motions to quash.

**The COURT.** Well, that gets back to exactly what I 282 was thinking about. You can make a motion then in the Supreme Court to dismiss their appeal, and argue it, whether the Supreme Court has—

Mr. BRITT. I think that is the proper—

The COURT (continuing). Jurisdiction to decide it.

Mr. BRITT (continuing). Place for it, your Honor, because the Rules so provide. They do not provide for any motion being made at this time. They specifically set forth the procedure; that is, for the defendants, if they are going to make anything against the jurisdiction of the court, to file a typewritten statement setting forth any matter or ground upon which they make their claim against the jurisdiction by the Supreme Court.

The COURT. I presume that order would be necessary to bring up the Borden-Wieland pleading.

Mr. BURNHAM. No, your Honor. This has nothing to do with Borden-Wieland at all, although I have another motion that I want to make with reference to Borden-Wieland, but this has only to do with all the defendants in the case except Borden-Wieland. This has to do with the situation where your Honor is now, by the effect of your order, stating that you ruled on the special pleas in bar, when as a matter of fact you only ruled on motions to quash and demurrers.

283 Now, Mr. Britt says—

The COURT. The record will show exactly what the ruling was.

Mr. BURNHAM. That is true, your Honor, but what you are doing here now by your order is practically certifying to the Supreme Court that you did in fact rule on the pleas in bar. We do not wish to enter the Supreme Court—

The COURT. There is nothing for the order to attach to, so can't you argue that in the Supreme Court?

Mr. BURNHAM. No, your Honor; because in effect you could, if you wished, in some way certify that there were pleas in bar involved. We do not want to have any such matter as that.

The COURT. Well, the Supreme Court might not agree with me.

Mr. BURNHAM. I know it might not; but they want to enter the Supreme Court with that advantage, to wit, that you have already passed upon the point, and held these demurrers to be, in effect, pleas in bar. We do not think that you should do that, and let them enter the Supreme Court with that advantage over the defendants.

284 You did not rule on anything but demurrers and motions to quash.

Let me explain again what the situation is, and why they seek this. The Criminal Appeals Act has two sections to it:

"(1) Permitting direct appeal in cases where the construction and validity of the basic statute is involved;

"(2) Regardless of construction and validity in cases where special pleas in bar have been ruled against the Government."

So they fear now that the construction and validity of the basic statute is not involved, and therefore, in order to get a second string to their bow, they attempt to make this a ruling by your Honor on a

special plea in bar, because, if it is a ruling on a special plea in bar, then construction and validity is not involved. So they appeal, as their petition itself says, on two grounds: (1) That the construction and validity of the basic statute is involved, and (2) That even if it is not a special plea in bar, has been ruled against them, and that therefore under Section 2 of the Criminal Appeals Act they are entitled to an appeal.

285 Now, whether they are right or not is beside the point. We thing that your Honor is not the one to pass upon that question, and that you have done so by granting them an appeal from a ruling made by you on a special plea in bar, when, as a matter of fact, the only ruling that you made was a ruling upon a demurrer and motion to quash; and all we ask is that you delete from the order that part of it which refers to special pleas in bar. For instance, the petition says, your Honor, that the Government "prays that it may be allowed to appeal to the Supreme Court for a reversal of such judgment and order insofar as it sustains the demurrs and motions to quash." That was the petition.

Now, then, the order says, "It is ordered that the United States of America be, and it is hereby, allowed an appeal from the order and judgment of this court sustaining the demurrs and motions of the defendant to quash the indictment and special pleas in bar."

They did not ask for it in the petition; they got it in the order. They have revealed the reason why they want it is to have the question prejudged here as they enter the Supreme Court as to whether or not pleas in bar were involved in your rulings.

286 Mr. BRITT. That's not—

Mr. BURNHAM. They may argue it. They may argue it, but they should not have a ruling by your Honor on the question.

Mr. BRITT. Your Honor, the statement in the order is an interpretation—

The COURT. I cannot see your point. Maybe I am dense this morning.

Mr. BRITT. It is an interpretation of the legal effect—

The COURT. I will have to ask you to excuse me for just a few moments.

(Short delay.)

The COURT. Proceed.

Mr. BURNHAM. If the Court please, the only thing that the defendants are interested in is having an order which comports with the facts. This order which was entered by your Honor states that pleas in bar were filed. No pleas in bar were filed. The order also states that pleas in bar were ruled upon. No pleas in bar were ruled upon.

Now, the importance of the situation comes from the fact that within 15 days from the time of the entry of this order we must, 287 if we so see fit, contest the jurisdiction of the Supreme Court to entertain this appeal.

We are going to contest it on the ground that the validity of the basic statute was not involved in your Honor's ruling on the demur-

ters on July 28th. They are going, of course, to contend that the validity of the statute was involved, but they are going to say, furthermore, even if we are defeated on that point, the Government has a right to appeal on another point, to wit, that the lower court ruled on special pleas in bar. They are then going to point to the record and say, "Look at the order which was entered by Judge Woodward on August 17th. It states that pleas in bar were filed and pleas in bar were ruled upon." The Supreme Court cannot go beyond and behind that record. That is the position that they wish to put us in here now. That is the position which we wish to avoid.

It is true that they may argue, when they get into the Supreme Court, that your ruling was in effect a ruling upon a plea in bar, had the effect of a ruling upon a plea in bar. We do not care whether they argue that, but we do not wish to have the record against us when they argue in the Supreme Court. That 288 is our position; and all we ask is that those words, "pleas in bar," be stricken from that order.

Mr. BRITT. May it please the Court, I disagree with Mr. Burnham's statement that the Supreme Court cannot go behind the order and say whether or not these were pleas in bar. The order merely states the legal effect of pleadings which were filed by the defendant, regardless of what the defendants call those pleadings; and I do not think that we should be required now to elect whether or not we will appeal on the ground that the construction of the basic statute was involved, or whether we shall appeal also and be able to urge also that we are appealing from a decision which in effect sustains a special plea in bar.

Mr. BURNHAM. We are not asking you to elect.

Mr. BRITT. Well then I think that ought to stand as it is.

The COURT. What is the wording of that original order?

Mr. BURNHAM. The order of August 17th stated:

"This cause having come on to be heard upon demurrers, 289 motions to quash and special pleas in bar interposed by the defendants, the Court orders that the appeal is hereby allowed from the order and judgment of this court sustaining demurrers and motions of the defendants to quash the indictment and special pleas in bar,"

and what we ask to be eliminated are the words—

The COURT. There was nothing as to special pleas in the order—

Mr. BURNHAM. What is that, your Honor?

The COURT (continuing). Except as to Borden Wieland.

Mr. BURNHAM. That is aside from this entirely. That comes up later. There were no special pleas in the order,

Mr. BRITT. They were not called so, but the effect of them was—when your Honor held that the Agricultural Adjustment Act barred a further prosecution under the indictment, under the Sherman Act, your Honor held that it barred a prosecution.

The COURT. It does occur to me that this is a matter that I cannot settle, that this court cannot settle; and, Mr. Burnham, if your position is correct on your motion to dismiss for want of jurisdiction, that matter can be urged before the Supreme Court, which has plenary power to decide it.

290 Mr. BURNHAM. That is true, your Honor, but when I do that they will point to the record and say the record shows that a plea in bar was filed and ruled on.

The COURT. In response to that you will point to the record and say that there are no pleas in bar involved at all. Here is the indictment. Here are the demurrers scattered all through this record, and the legal effect of what I said was you challenge the sufficiency of the indictment as a pleading, and as a matter of law that indictment cannot be sustained.

Now, it is for the Supreme Court to determine whether demurrers are pleas in bar, or rejoinders, or whatever you want to call them. This court cannot finally determine that.

Mr. BURNHAM. Then why, your Honor, should you call these demurrers pleas in bar, and all we want is to have you refrain from calling them pleas in bar.

The COURT. I might misconstrue it.

291 Mr. BURNHAM. Well, we wanted to go up on that, that's all. The COURT. I don't think they are pleas in bar, for that matter, as far as I know any pleading, but the Government may disagree with that.

Mr. BURNHAM. But, your Honor, the order says that.

The COURT. The Government ought to have the right to present the matter to the Supreme Court.

Mr. BURNHAM. But your Honor, your Honor said that they filed pleas in bar. Your Honor just said you don't think they are pleas in bar.

The COURT. If the record does not support it, there is nothing for that statement to attach to.

Mr. BURNHAM. What possible objection, your Honor, could there be to striking out from this order the words which do not comport with the facts? That's all I want.

The COURT. The Supreme Court may disagree with me.

Mr. BURNHAM. Well, that would be an argument as to the effect of the demurrers but not on an argument as to the fact as to whether there were special pleas in bar filed, that's all.

The COURT. That is a matter, it seems to me, you will have to argue before the Supreme Court.

292 Mr. SCHAFER. If the Court please, if this was done—what the Government says what you call a demurrer was in effect a plea in bar—now if they put in there that the documents which we filed, whether they are called demurrers or motions to

quash, or anything else, were treated as pleas in bar, were in effect considered pleas in bar, I think that you obviate that.

The COURT. I think my opinion makes it very definite, as to what I have ruled on.

Mr. BRITT. Yes.

The COURT. Call them that or call them anything else they want to in the order, if the record does not support that finding in the order, that statement in the order, then you can make the same argument in the Supreme Court that you are making here.

I will deny the motion.

Mr. BURNHAM. Your Honor, there is another matter that I think there will be no controversy about.

Borden-Wieland, you will recall, was dismissed out on the ground—

The COURT. Yes.

Mr. BURNHAM (continuing). That there was a plea in abatement filed. Then when they filed petition to appeal they left out 298 any reference to Borden-Wieland. When they filed the order granting the appeal, they left out any reference to Borden-Wieland. When they filed their assignment of errors they left out any reference to Borden-Wieland; but when the citation was issued it included the name of Borden-Wieland. I think it is agreeable—

Mr. BRITT. I will agree to that. We do not intend to appeal from the order to dismiss service on Borden-Wieland. That may be stricken from the citation, their name. It was just included so they would get notice of all things if they wanted them.

Mr. BURNHAM. They are not in existence.

Mr. BRITT. The citation required them to appear, but we will ask—we will consent that their name be stricken from the citation. Is that satisfactory?

The COURT. Does this court have authority to do that?

Mr. BURNHAM. Yes; your Honor. It is within term.

The COURT. Oh, yes.

Mr. BURNHAM. You issued the citation.

Mr. BRITT. Your Honor issued the citation.

The COURT. I issued the citation; that is right.

Mr. BRITT. There is no question about that.

294 Mr. BURNHAM. I will send that over.

The COURT. Prepare your motion slip or draft of an order.

Mr. BRITT. There is no question about that.

Mr. BURNHAM. And I will file the other motion papers that we have here, just now.

The COURT. All right.

(Which were all the proceedings had in the above entitled cause.)  
And forasmuch as the matters above set forth do not fully appear of record, certain defendants tender this their Bill of Exceptions,

and pray that the same may be signed by the Judge of this Court; which is done accordingly, this 1st day of September 1939.

CHARLES E. WOODWARD, Judge.

[File endorsement omitted.]

307 [Clerk's certificate to foregoing transcript omitted in printing.]

308 In Supreme Court of the United States

*Statement of points and designation of record to be printed*

Filed October 2, 1939

I

United States of America, Appellant, states that in its brief and oral argument on its appeal in the above-entitled cause it will rely upon the points stated in its assignment of errors therein.

II

The entire record in this cause as filed in this Court is necessary for consideration of the points stated by appellant, and the entire transcript of record as transmitted by the Clerk of the District Court should be printed by the Clerk of this Court.

ROBERT H. JACKSON,  
Robert H. Jackson,  
Solicitor General.

PROOF OF SERVICE

Service of the within Statement of Points and Designation of Record to be printed acknowledged September 30, 1939.

Sidley, McPherson, Austin & Burgess (G. A. R. Jr.), Donald F. McPherson, Cecil I. Crouse, Howard Neitzert, Mayer, Meyer, Austrian & Platt, Frederic Burnham, Sidley, McPherson, Austin & Burgess, Esqs., Donald F. McPherson, Esq., Mayer, Meyer, Austrian & Platt, Esqs., Frederic Burnham, Esq., Cecil I. Crouse, Esq., Howard Neitzert, Esq., Attorneys for The Borden Company; Charles L. Dressel, Harry M. Reser, W. A. Baril, H. W. Comfort, S. M. Ross, O. O. Smaha, R. W. Nessler, F. A. Webb, W. A. Wentworth, Defendants.

Montgomery, Hart, Pritchard & Herriott, Louis E. Hart, Irving Herriott, L. Edward Hart, Jr., by W. W. John; Montgomery, Hart, Pritchard & Herriott, Esqs., Louis E. Hart, Esq., Irving Herriott, Esq., L. Edward Hart, Jr., Esq., Attorneys for Bowman Dairy Company; D. B. Peck, Francis H. Kullman, Jr., M. J. Metzger, H. T. Adamson, J. F. Philippi, Defendants.

Deneen and Massena, Charles S. Deneen, Donald N. Schaffer; Deneen & Massena, Esqs., Charles S. Deneen, Esq., Donald N. Schaffer, Esq., Attorneys for Hunding Dairy Company, Carl W. Hunding, Defendants.

Isidore Fried; Isidore Fried, Esq., Attorney for Capitol Dairy Company, Hyman Freed, Defendants.

Gann, Secord, Stead, & McIntosh; Bernhardt Frank, Secy., Gann, Secord, Stead & McIntosh, Esqs.; Bernhardt Frank, Esq., Attorneys for Sidney Wanzer & Sons, Inc., International Dairy Company, Milk Dealers Bottle Exchange, Gordon B. Wanzer, H. Stanley Wanzer, Louis Janata, Defendants.

Fred C. Nonnamaker, Jr., B. F.; Fred C. Nonnamaker, Jr., Esq., Attorney for Associated Milk Dealers, Inc., Paul Potter, Otto Black, Defendants.

Schuyler & Hennessy, George W. Lennon, W. C. Graves, Martin Burns, J. M.; Schuyler & Hennessy, Esqs., George W. Lennon, Esq., W. C. Graves, Esq., Martin Burns, Esq., Attorneys for Pure Milk Association, Don N. Geyer, Edward F. Cooke, E. E. Houghtby, F. J. Knox, Lowell D. Oranger, John P. Case, Defendants.

Isham, Lincoln & Beale, Ben H. Matthews, James P. Dillie (g. v.); Isham, Lincoln & Beale, Esqs., Ben H. Matthews, Esq., James P. Dillie, Esq., Attorneys for Leland Spencer, Defendant.

Edward H. Murnane, Esq., James A. Harrington, Esq., per A. L., Edward H. Murnane, Esq., James A. Harrington, Esq., Attorneys for: Western-United Dairy Company, Western Dairy Company, Inc., United Dairy Company, Louis G. Glick, Maurice S. Dick, Samuel S. Dick, Defendants.

Frank J. Gillespie, Joseph A. Padway, David A. Riskind, per D. B., David A. Riskind, Esq., Joseph A. Padway, Esq., Frank J. Gillespie, Esq., Attorneys for: Milk Wagon Drivers' Union, Local 753, Robert G. Fitchie, James Kennedy, Steve Sumner, Fred C. Dahms, F. Ray Bryant, John O'Connor, David A. Riskind, Defendants.

Kirkland, Fleming, Green, Martin & Ellis, Weymouth  
Kirkland, Jay Fred Reeve, Daniel D. Carmell (by  
Kirkland, Fleming, Green, Martin & Ellis), A. Lowry;  
Kirkland, Fleming, Green, Martin & Ellis, Esq.,  
Weymouth Kirkland, Esq., Jay Fred Reeve, Esq.,  
Daniel D. Carmell, Esq., Attorneys for: Leslie G.  
Goudie, Defendant.

Thomas Dodd Healy, M. M., Thomas Dodd Healy, Esq.,  
Attorney for: Daniel A. Gilbert, Defendant.

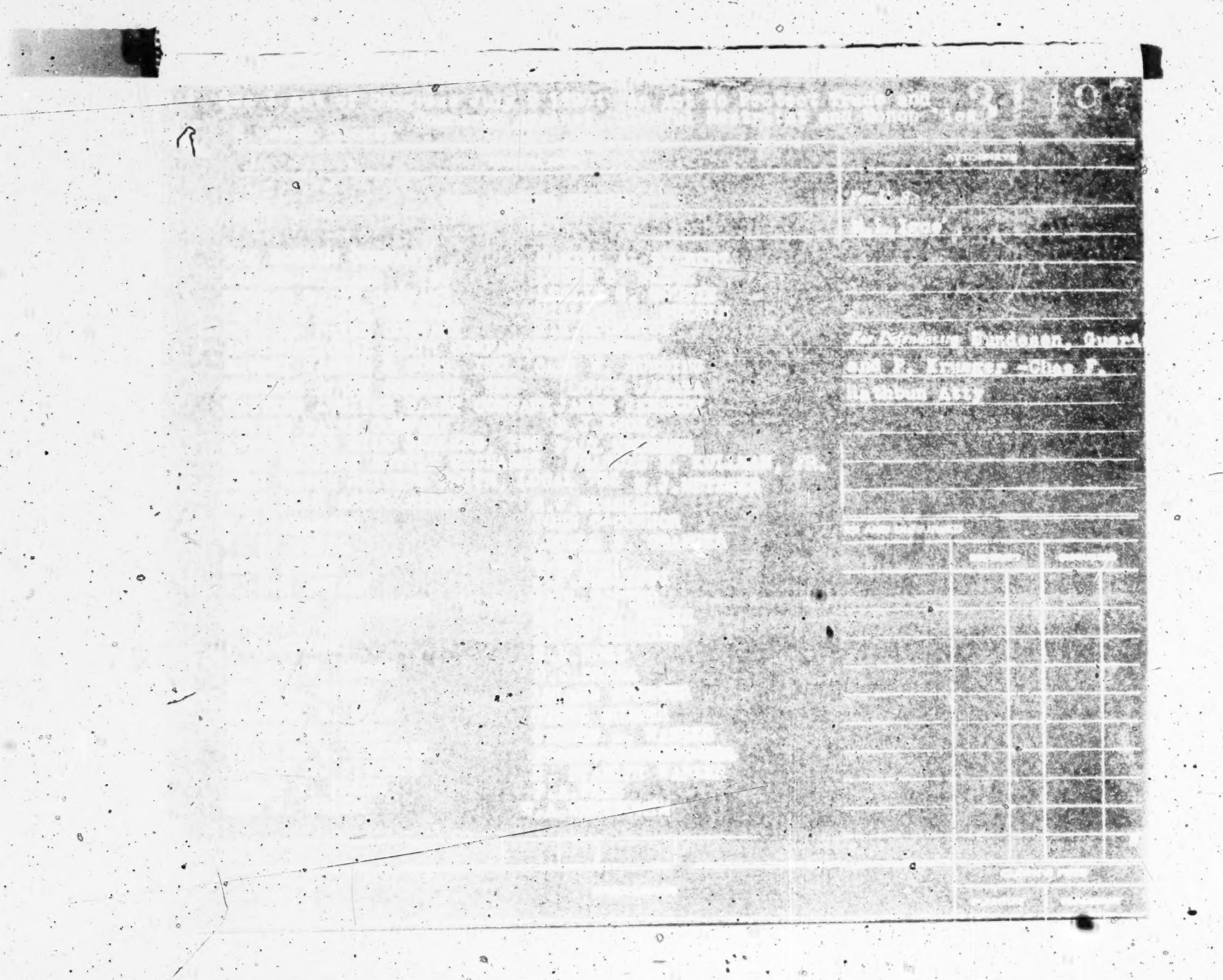
Charles F. Rathbun, Charles F. Rathbun, Esq., Attorney  
for: Herman N. Bundesen, Paul Krueger, William J.  
Guerin, Defendants.

[File endorsement omitted.]

[Endorsement on cover:] File No. 48804. N. Illinois, D. C. U. S.  
Term No. 897. The United States of America, Appellant, vs. The  
Borden Company, Charles L. Dressel, Harry M. Reser, et al. Filed  
September 18, 1939. Term No. 897, O. T. 1939.

R  
R. L. and Lundeen, Owners  
and Managers - Chas. E.

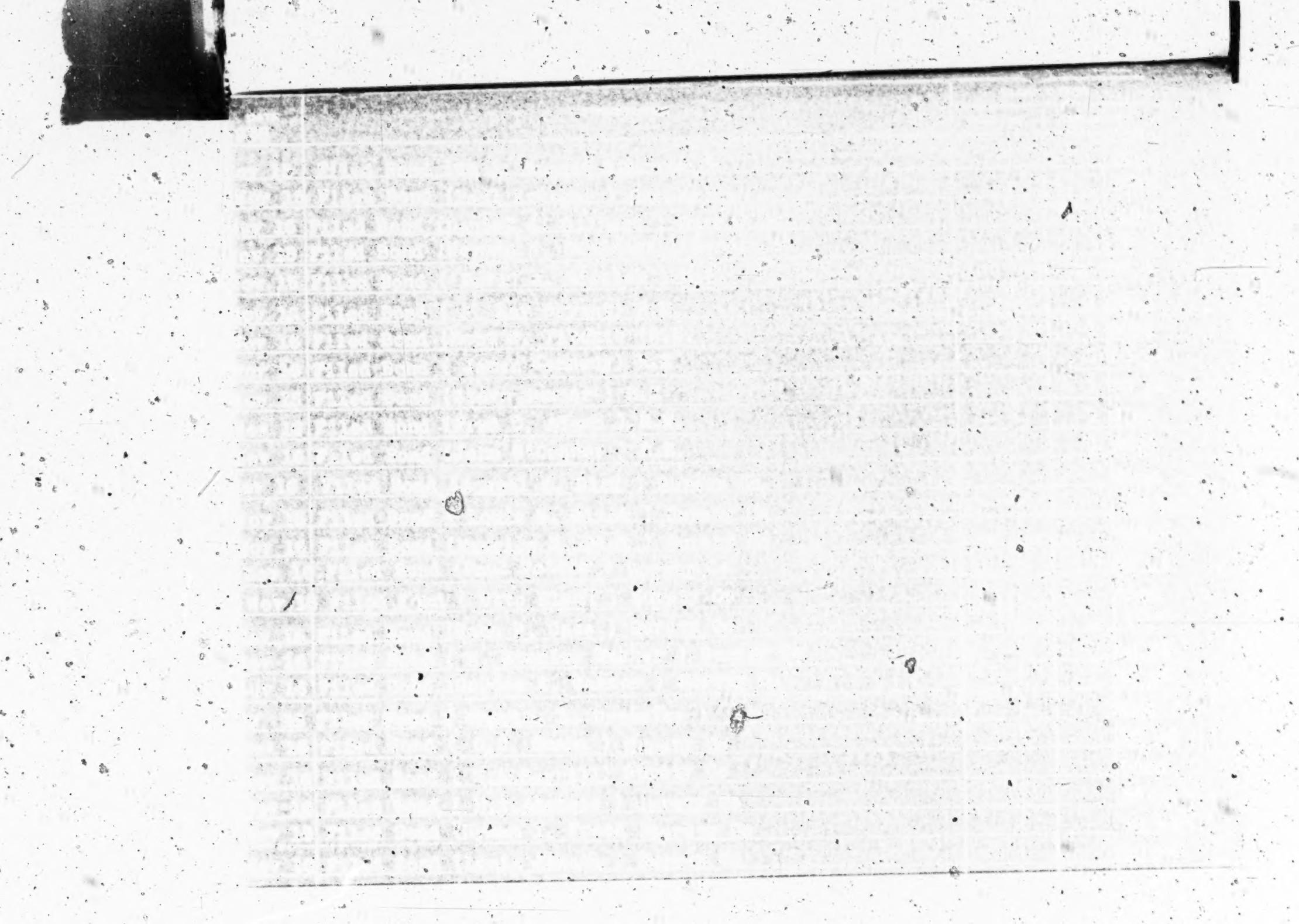
RENTALS



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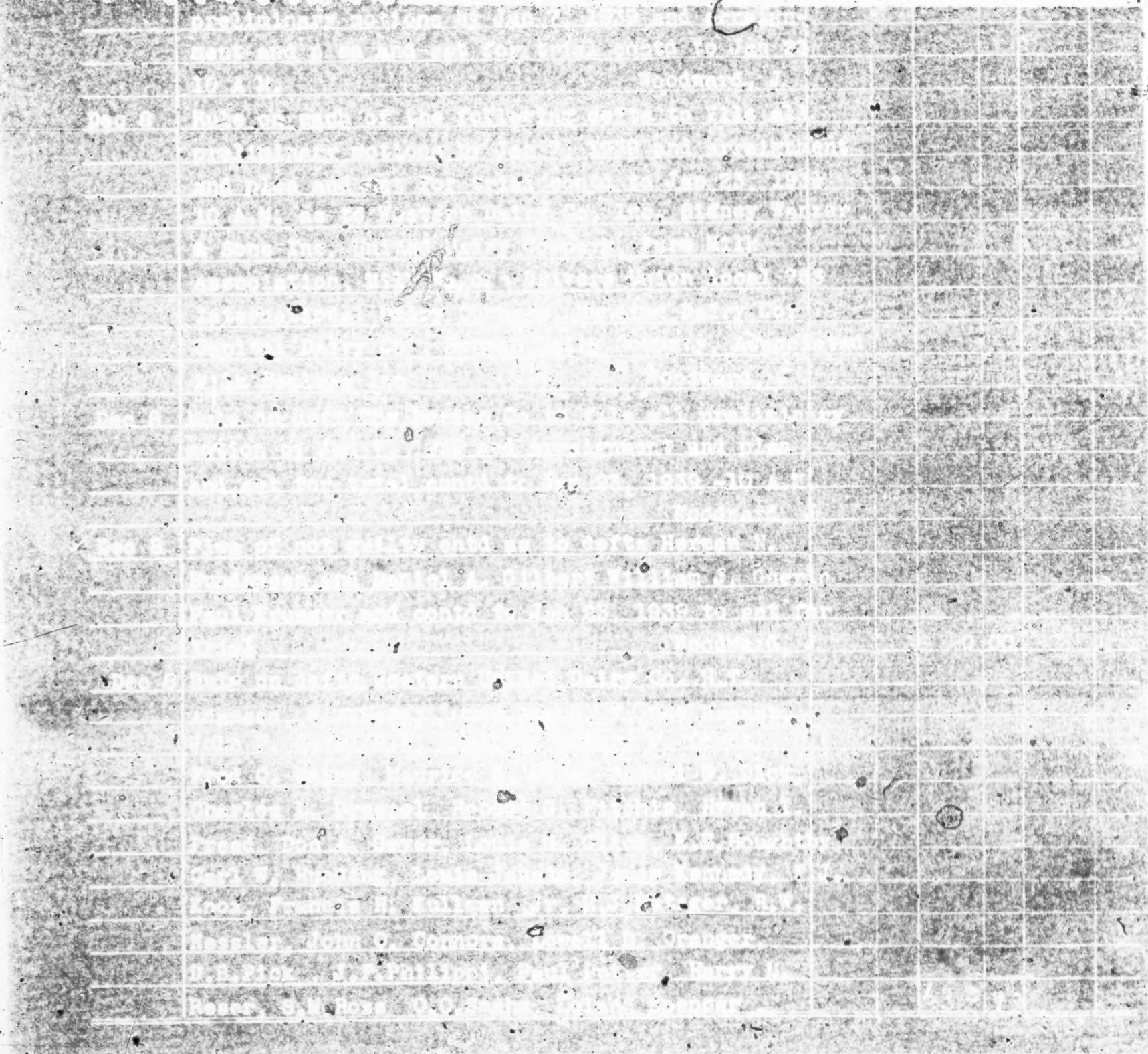




DATE	FILINGS-PROCEEDINGS	CHARGE OR FEE		AMOUNTS REPORTED IN EXCISEMENT STATEMENT
		PLAINTIFF	DEFENDANT	
Nov 16	Lewis E. Hart		11.00	
Nov 16	Issued (4) copies of Indictment to Albert G. Krane Atty		64.00	
Nov 16	Issued (6) indictments to Byn McIntire		37.00	
Nov 17	Issued copy of Indictment to Kirkland, Fleming Green, Martin & Ellis and Daniel D. Carmell		16.00	
Nov 22	Issued copy of Indictment to Fred C. Nonnamaker Jr.		14.20	
Nov 23	Issued (2) copies of Indictment to Isidore Freed Atty		32.40	
Dec 1	Filed Appearance of Paul Potter and Otto Blank - Fred C. Nonnamaker, Jr Atty			
Dec 1	Issued (2) certified copies to Fred C. Nonnamaker Jr. Atty		24.00	
Dec 3	Filed Appearance -The Borden Co, Charles L. Dressel, Harry M. Riser, W.A. Baril, H.W. Confort S.M. Ross, O.C. Omaha, R.W. Nessler, F.A. Webb, Leland Spencer and W.A. Wentworth by Frederic Burnham, Donald F. McPherson and Cecil L. Grouse			
Dec 6	Filed Appearance , Leland Spencer by Isham Lincoln and Beale Attys			
Dec 6	Issued certified copy of Indictment to Isham Lincoln & Beale Attys		8.10	
Dec 6	Filed Appearance -Fire Milk Association , Don L. Geyer, Edward F. Cooke F.E. Houghtby, F.J. Knowlton Lowell D. Oranger and John P. Case by Samuels & Hennessy, George W. Lennon, W.G. Graves and Martin Burns Atty's			
Dec 6	Filed Appearance -Western United Dairy Company			

- Fred C. Nonnemaker, Jr Atty
- Dec 1 Issued (2) certified copies to Fred C. Nonnemaker  
Jr, Atty 34.00
- Dec 3 Filed Appearance -The Borden Co, Charles L.  
Dressel, Harry M. Reser, W.A. Baril, H.W. Confort  
S.M. Ross, O.C. Smaha, R.W. Nestler, F.A. Webb,  
Leland Spencer and W.A. Wentworth by Frederic  
Burkham, Donald F. McPherson and Cecil L. Grunze
- Dec 6 Filed Appearance , Leland Spencer by Isham Lincoln  
and Beale Attys 3.10
- Dec 6 Issued certified copy of Indictment to Isham  
Lincoln & Beale Attys 3.10
- Dec 8 Filed Appearance -Pure Milk Association , Don K.  
Geyer, Edward P. Cooke, E.E. Houghtby, F.J. Knob  
Lowell D. Oranger and John P. Gray by Sander  
& Hennessy, George W. Lennon, W.C. Graves and  
Martin Burns Attys
- Dec 6 Filed Appearance -Western -United Dairy Company  
a Corp Western Dairy Co., Inc., a Corp United Dairy  
Company a Corp Maurine, Dick, Harrington, and Samuel A.  
Samuel S. Dick by E.L. Harrington, and Samuel A.  
Harrington Attys
- Dec 7 Issued certified Copy of Indictment to Harrington &  
Maurine Attys 3.10
- Dec 8 Filed Appearance , Bowman Dairy Company, J. E.  
D.B. Beck, Francis H. Kullman, Jr. H.J. Hart  
H.T. Adamson and J.F. Philippi -Louis A. Hart, Louis  
Herrington and L. Edward Hart Jr. Attys 3.10

DATE	CLERK'S FEE	AMOUNT REPORTED IN CLERK'S FEE
1938		
Dec 6	Filed App. for record Kingsbury Co., Minn.	
Dec 6	Filing	
Dec 8	Build	



DATE	FILINGS - PROCEEDINGS	CLERK'S FEES		AMOUNT REPORTED IN EMOLUMENT RETURNS
		PLAINTIFF	DEFENDANT	
Dec 9 1938	Steve Sumner Gorden B. Wanzer, H. Stanley Wanzer E.A. Webb and W.A. Wentworth to file with the Clerk of the Court all preliminary motions in above cause on or before Jan 7, 1939 and for arraignment and plea and to set for trial as to each deft, contd to Jan 23, 1939-10 A.M. and leave given defts Leslie Goudie and Dan Gilbert to withdraw pleas of not guilty and file all preliminary motions by Jan 7 and contd to Jan 23 for plea and to set for trial and leave given Borden Weiland Inc. to file motion to quash service Woodward, J			637.90
Dec 9	Summons ret'd executed (Milk Wagon Drivers Union Local 753 )			
Dec 9	Summons ret'd executed -PureMilk Association			
Dec 9	Summons ret'd executed Borden -Weiland Inc			
Dec 9	Summons ret'd executed -Capitol Dairy Co.			
Dec 9	Summons ret'd executed -Sidney Wanzer & Sons, Inc			
Dec 9	Summons ret'd executed -Hunding Dairy Co			
Dec 9	Summons ret'd executed -Western United Dairy Co			
Dec 9	Summons ret'd executed -United Dairy Company			
Dec 9	Summons ret'd executed - Western Dairy Co, Inc			
Dec 9	Summons ret'd executed @ Bowmar Dairy Company			
Dec 9	Summons ret'd executed -Milk Dealers Bottle Exchange			
Dec 9	Summons ret'd executed -International Dairy Company			
Dec 9	Summons ret'd executed -Associated Milk Dealer's Inc			
Dec 9	Summons ret'd executed -The Borden Company			
Dec 12	Filed Appearance of Daniel A. Gilbert by Thomas Dodd Healy Atty			
Dec 12	Issued copy of Indictment to Thomas D Healy Atty			8.00
Dec 23	Filed Notice - Burnham, Hart & McInish Atty's			647.00
Dec 23	Order that said orders of Dec 8, 1938 be and the same are hereby modified to require all defts			

of not guilty and file all preliminary motions  
 by Jan 7 and contd to Jan 23 for plea and to set  
 for trial and leave given Borden Weiland Inc. to  
 file motion to quash service Woodward, J

Dec 9 Summons ret'd executed (Milk Wagon Drivers Union  
 Local 753 )

Dec 9 Summons ret'd executed - Pure Milk Association

Dec 9 Summons ret'd executed Borden - Weiland Inc

Dec 9 Summons ret'd executed - Capitol Dairy Co.

Dec 9 Summons ret'd executed - Sidney Wanzer & Sons, Inc

Dec 9 Summons ret'd executed - Hunding Dairy Co

Dec 9 Summons ret'd executed - Western United Dairy Co

Dec 9 Summons ret'd executed - United Dairy Company

Dec 9 Summons ret'd executed - Western Dairy Co, Inc

Dec 9 Summons ret'd executed @ Bowman Dairy Company

Dec 9 Summons ret'd executed - Milk Dealers Bottle Exchange

Dec 9 Summons ret'd executed - International Dairy Company

Dec 9 Summons ret'd executed - Associated Milk Dealer's Inc

Dec 9 Summons ret'd executed - The Borden Company

Dec 12 Filed Appearance of Daniel A. Gilbert by Thomas  
 Dodd Healy Atty

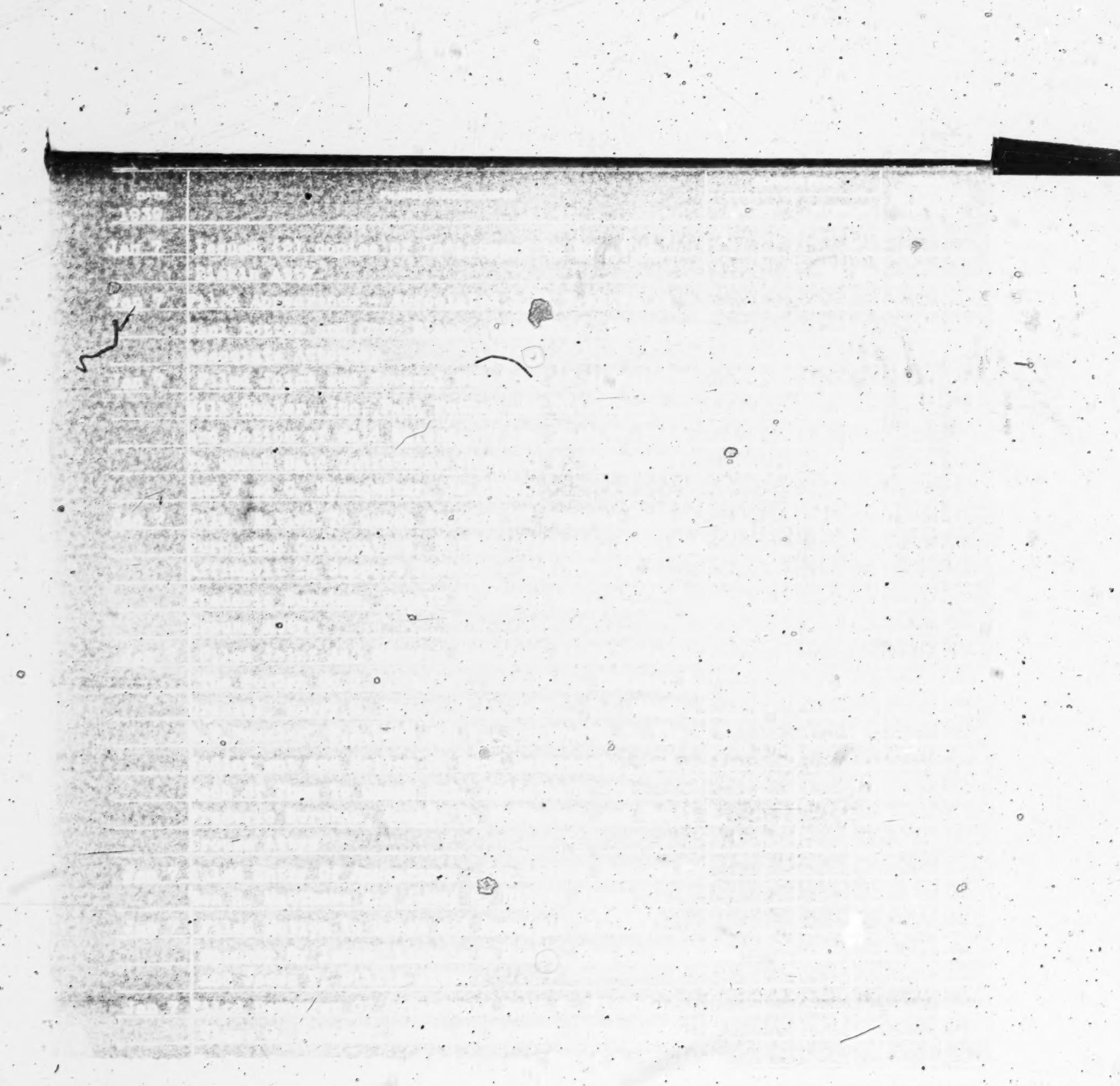
Dec 12 Issued copy of Indictment to Thomas D Healy Atty

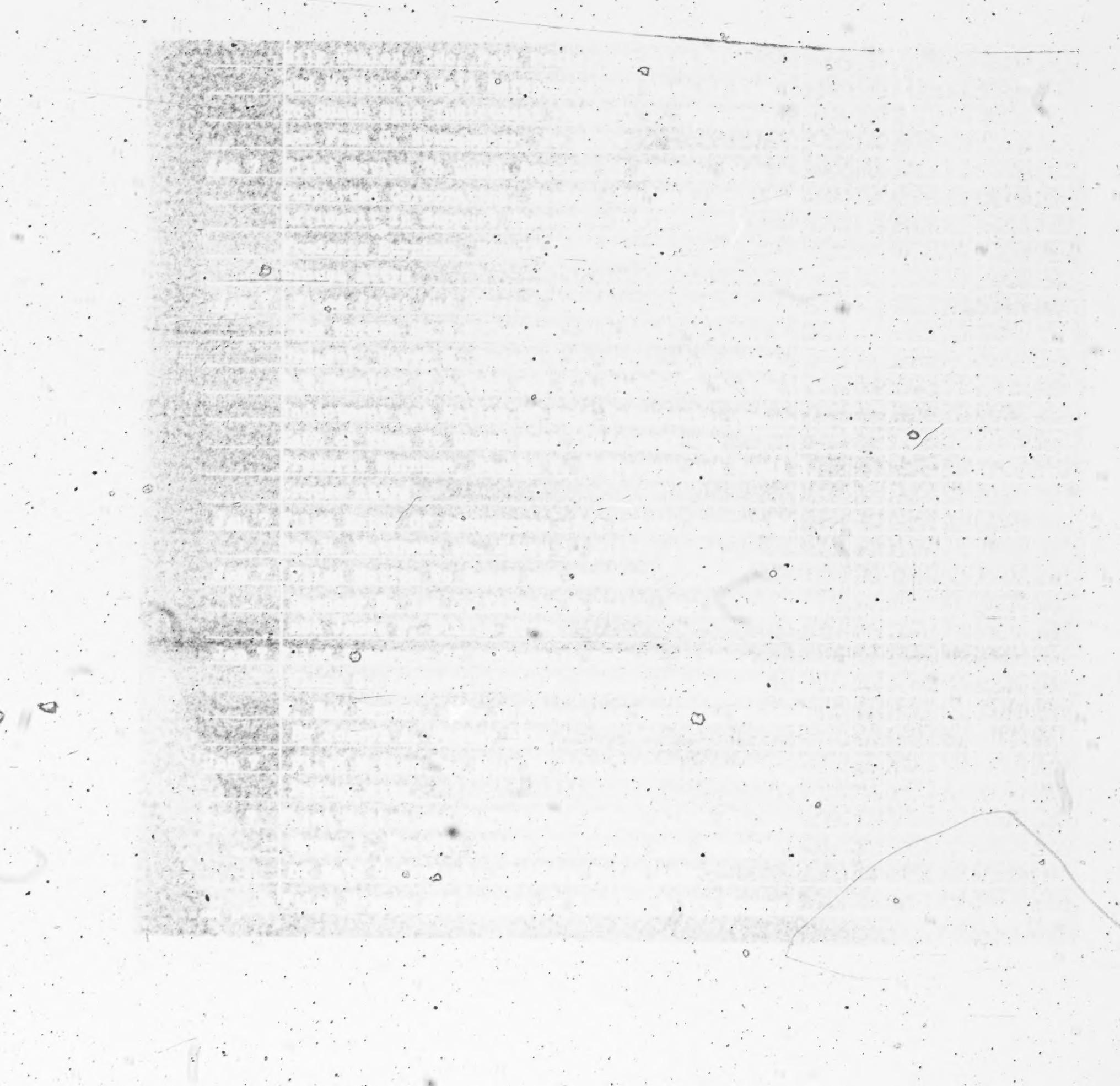
Dec 23 Filed Notice - Burkhams, Hart & McInish Attys

Dec 23 Order that said orders of Dec 8, 1938 be and the  
 same are hereby modified to require all defts  
 who desire to file motions, demurrers or pleas  
 in abatement herein to file a motion, demurrer  
 or such a plea with the Clerk of this Court by

1939 Jan 7, 1939 (draft) Woodward, J

Jan 6 Filed Demurrer of Dft Daniel A. Gilbert -  
 Thos Dodd Healy Atty







DATE	PLAINTIFFS - PROCEEDINGS	CLERK'S FILED		AMERICAN FOOD AND MILK INDUSTRY ASSOCIATION TESTIMONY
		PLAINTIFF	DEFENDANT	
Jan 7 1939	and Carl W. Hunding To Quash Indictment And Demurrer Of Said Defendants - Doneen and Maasera Attys			
Jan 7	Filed Motion & Demurrer Of Defendants Bowman Dairy Co., D.C. Peck, Francis H. Kullman, Jr., M.J. Metzger, H.T. Adanson and J.P. Philippi by Louis E. Hart, Irving Herriott and L. Edward Hart, Jr., Attorneys			
Jan 7	Filed (6) Demurrers. United Dairy Company, a Corp. Maurice S. Dick, Samuel S. Dick, Western United Dairy Co., a Corp. Western Dairy Company, Inc. Corp. and Louis C. Glick by James A. Harrington and Edward H. Murnane Attys			
Jan 7	Filed Demurrer and Motion To Quash Indictment - Leslie G. Goudis By Weymouth Kirkland and Jay Fred Reeve Attys			
Jan 7	Filed Motion For Bill of Particulars - Weymouth Kirkland and Jay Fred Reeve Attys			
Jan 7	Filed (6) Demurrers to Indictment - Louis Janata Milk Dealer's Bottle Exchange, a Corporation, International Dairy Company, a Corp. Sidney Wanzer & Sons, Inc. a corp. Gordon B. Wanzer and Stanley H. Wanzer - Loy M. McIntosh, David R. Gann, Frederick Secord and J. Walter Stead, Attys			
Jan 7	Filed Motion To Quash and Demurrer for Pure Milk Association, Don N. Geyer, Edward F. Cooke, E.H. Houghtby, F.J. Knox, Lowell D. Oranger and John F. Case By George W. Lennon, W.C. Graves, Schuyler and Hanassy, and Martin Burns Attys			
Jan 7	Filed Memorandum of Authorities and Suggestions In Support of Motion To Quash and Demurrer In			

Attorneys	
Jan 7	Filed (6) Demurrers. United Dairy Company, a Corp. Maurice S. Dick, Samuel S. Dick, Western United Dairy Co., a Corp. Western Dairy Company, Inc. a Corp. and Louis G. Glick by James A. Harrington and Edward H. Murnane Attys
Jan 7	Filed Demurrer and Motion To Quash Indictment -Leslie G. Goudie By Weymouth Kirkland and Jay Fred Reeve Attys
Jan 7	Filed Motion For Bill of Particulars - Weymouth Kirkland and Jay Fred Reeve Attys
Jan 7	Filed (6) Demurrers to Indictment -Louis Janata Milk Dealer's Bottle Exchange, a Corporation, International Dairy Company, a Corp. Sidney Wanzer & Sons, Inc. a corp. Gordon B. Wanzer and Stanley H. Wanzer -Loy N. McIntosh, David R. Gann, Frederick Secord and J. Walter Stead, Attys
Jan 7	Filed Motion To Quash and Demurrer for Pure Milk Association , Don N. Geyer, Edward F. Cooke, E.E. Houghtby, F.J.Knox, Lowell D. Oranger and John P. Case By George W. Lennon, W.C.Graves, Schuyler and Hennessy, and Martin Burns Attys
Jan 7	Filed Memorandum of Authorities and Suggestions In Support pf Motion To Quash and Demurrer In Behalf Of Defts.Pure Milk Association. Don N.Geyer Edward F. Cook E.E.Houghtby, F.J.Knox, Lowell D. Oranger and John P. Case- By George W. Lennon W.C.Graves, Schuyler & Hennessy and Martin Burns their attys
Jan 10	Filed Notice (2) Joseph A. Padway and David A. Riskind Attys

DATE 1939	FILINGS-PROCEEDINGS	CLERK'S FEES		AMOUNT REPORTED IN EMOLUMENT RETURNS
		PLAINTIFF	DEFENDANT	
Jan 10	Filed Praecept - Leo F. Tierney, certified orders issued		1 60	
Jan 10	Filed Notice - Isidore Fried Atty for Capitol Dairy Co and Hyman I. Freed			
Jan 10	Filed Memorandum In Support of Demurrers- Gann Secord, Stead & McIntosh Attys for Loy N. McIntosh and Bernard Fernhardt Frank of Counsel			
Jan 10	Filed Notice-Frederic Burnham, Donald F. McPherson and Cecil I. Crouse Attys	X		
Jan 17	Filed (2) Notices-U.S. Atty & Leo F. Tierney Spl Ass't to Atty Gen'l			
Jan 17	Ordered that plea and arraignment of the defts in above cause contd from Jan 23, to Feb 23, 1939 (draft) Ordered that time of Gov't in which to answer, reply, demur or otherwise plead with respect to the several pleas, demurrers and motions heretofore filed herein by the defts and also the time of the Gov't in which to file its reply briefs, memoranda and points of authorities heretofore filed herein by the defts is extended to and including Feb 23, 1939 Woodward, J			
Feb 10	Filed Praecept - Thurman Arnold Ass't Atty General certified copies issued			3 20
Feb 20	Filed Notice - Werner W. Schroeder and Donald Kane and Charles W. Wilson Attys for National Cooperative Milk Producers'			
Feb 20	Filed Petition of National Cooperative Milk Producers' by Schroeder, Kane and Wilson Attys			
Feb 20	Petition of National Cooperative Milk Producers' Federation to Intervene and file Brief Amicus Curiae set for hrg March 17, 1939 -2 P.M.			
		Woodward, J		

- Jan 10 Filed Notice-Frederic Burnham, Donald F. McPherson  
 and Cecil I. Crouse Attys X
- Jan 17 Filed (2) Notices-U.S.Atty & Leo F. Tierney Spl  
 Ass't to Atty Gen'l
- Jan 17 Ordered that plea and arraignment of the defts  
 in above cause contd from Jan 23, to Feb 23,  
 1939 (draft) Ordered that time of Gov't in which  
 to answer, reply, demur or otherwise plead with  
 respect to the several pleas, demurrers and motions  
 heretofore filed herein by the defts and also  
 the time of the Gov't in which to file its  
 reply briefs, memoranda and points of authorities  
 heretofore filed herein by the defts is extended  
 to and including Feb 23, 1939 Woodward, J
- Feb 10 Filed Praesipe - Thurman Arnold Asst Atty General  
 certified copies issued 3 20
- Feb 20 Filed Notice - Werner W. Schroeder and Donald  
 Kane and Charles W. Wilson Attys for National  
 Cooperative Milk Producers '
- Feb 20 Filed Petition of National Cooperative Milk  
 Producers' by Schroeder, Kane and Wilson Attys
- Feb 20 Petition of National Cooperative Milk Producers'  
 Federation to Intervene and file Brief Amicus  
 Curiae set for hrg March 17, 1939 -2 P.M.  
 Woodward, J
- Feb 23 Lv granted defts to file reply brief on or before  
 April 3, plea and arraignment all defts contd  
 to April 14, 1939-all contested motions set for  
 April 13, -10 A.M. Woodward, J
- Mar 9 Filed Notice - Burnham, McPherson and Crouse Attys  
 for the Borden Company 37 20

DATE 1939	FILINGS-PROCEEDINGS	CLERK'S WORK		AMOUNT EXPENSES - \$
		PLAINTIFFS	DEFENDANTS	
Mar 9	By agreement of counsel motion entitled and contd to March 10, 1939- 10 A.M. Woodward, J		37 2.0	
Mar 9	Filed Petition - Burnham, McPherson and Grouse Atty's for the Borden Company			
Mar 10	By granted Borden Company to withdraw from the custody of the Clerk of the District Court, Northern District of Illinois, Eastern Division the corporate minute books of The Borden Company containing minutes of the meetings of the stock holders and the board of directors of the Borden Company held during the period beginning Jan 1, 1938 and ending Sept 28, 1938, the said The Borden Company to have control and custody of said minute books for eleven days beginning April 14 1939 and ending April 24, 1939 (draft) Woodward, J			
Mar 17	Arguta hr'd and petition of National Co-Operative Milk Producers Federation to intervene and file Brief Amicus Curiae, denied Woodward, J			
Mar 24	Filed Reply Brief of Defendants in Support of Their Motion for Bill of Particulars - Joseph A. Padway Atty			
Mar 24	Filed Brief of Defendants In Reply to Government's Brief In Opposition to Defendant's Demurrer Joseph A. Padway Atty			
Mar 31	Filed Notice - Schuyler & Henneacy (Geo W. Leinen Martin Burns			
Mar 31	Order extdg time to April 8, 1939 for draft Pure Milk Association, Don E. Geyer, Edward P. Cooke E.E. Houghtby, T.J. Knox, Lowell P. Orman and John P. Case to file their Brief of Appeal of Authorities in reply to brief of the U.S.		37 1.0	

Northern District of Illinois, Eastern Division  
the corporate minute books of The Borden Company  
containing minutes of the meetings of the stock  
holders and the board of directors of the Borden  
Company held during the period beginning Jan 1st  
1938 and ending Sept 12, 1938, the said The  
Borden Company to have control and custody of said  
minute books for eleven days beginning April 14  
1939 and ending April 24, 1939 (draft) Woodward.

Mar 17 Argued and petition of National Co-Operative  
Milk Producers Federation to intervene and file  
Brief Amicus Curia, denied Woodward, J.

Mar 24 Filed Reply Brief of Defendants in Support of  
Their Motion For Bill of Particulars Joseph  
A. Padway Atty

Mar 24 Filed Brief of Defendants In Reply to Government's  
Brief In Opposition to Defendant's Demurrer  
Joseph A. Padway Atty

Mar 31 Filed Notice - Schuyler & Hennessy, Geo E. London  
Martin Burns

Mar 31 Order extdg time to April 8, 1939 for debtors  
Pure Milk Association, Don N. Geyer, Edward P.  
Cooke, E.E. Houghtby, F.J. Knox, Lowell P. Oranger  
and John P. Case to file their Brief or Memorandum  
of Authorities in reply to brief of the U.S. 3724  
hereinbefore filed in this cause - Woodward.

Apr 3 Filed Notice - Sidley, McPherson, Austrian Burgess  
Mayer, Meyer, Austrian & Platt, Montgomery, Hart  
Pritchard & Herriott, Isidore Fried, Attys for  
certain debtors

Apr 3 Filed Reply Memorandum In Support of Demurrers  
filed on Behalf of Defts Western United Dairy Co

1234

- A Corporation, et al - James A. Woodward and  
H. Murray Action.
- Apr 10 Order that date for argumentation be set for April 13 and 14, 1939.
- 1939
- June 7 Mot for leave to withdraw filed by David A. Riskin allowed and pitch of leave withdrawn and lv granted to file a demurrer heretofore filed. Woodward.
- June 7 Arguments had in part and contd to June 8, 1939 at 10 A.M. for further arguments or demurrer and to quash. Woodward.
- June 8 Arguments had and the several motions and demurrers taken under advisement. Woodward.
- July 11 Order rule on motion to quash and dismiss set for July 12th, 1939, 10 A.M.
- July 13 Filed Opinion.
- July 13 Order by the Court; Opinion filed. Draft of opinion submitted.
- July 29 Filed Notice - Chas T. Krueger and Wm J. Guerin.
- Bundesen, P. Krueger and Wm J. Guerin.
- July 30 Filed Notice and Petition.
- July 30 Krueger and Guerin.
- Order that lv be granted contra George H. Krueger and Wm J. Guerin to make several pieces of not guilty and nolo contendere to file instantaneously their joint and several demurrers (joined).
- July 28 Order that sum service of process be quashed and set aside and therefore

to David A. Blakind allowed and plea of not guilty  
withdrawn and lv granted to file a demurrer.  
demurrer heretofore filed Woodward, J.

June 7 Arguments hrd in part and contd to June 8, 1939  
10 A.M. for further argmts on demurrers and to  
to quash Woodward, J.

June 8 Arguments hrd and the several motions and de-  
murrers taken under advisement Woodward, J.

July 11. Order rule on motion to quash and demur-  
rer set for July 13th, 1939., 10-A.M.

July 13. Filed Opinion.

July 13. Order by the Court; Opinion filed. Draft orders  
to be submitted. Woodward, J.

July 29 Filed Notice - Chas F. Rathbun Atty for defts.  
Bundesen, P. Krueger and Wm J. Guerin

July 29 Filed Motion and Demurrers-Defts. Bundesen,  
Krueger and Guerin by Chas F. Rathbun Atty  
Order that lv be granted defts Hov. n N. Bundesen, P.  
Krueger and Wm J. Guerin to withdraw their  
several pleas of not guilty and said defts at once  
lv to file instantaneously their joint and several  
demurrers (draft) Woodward, J.

July 28 Order that the service of process upon Robert  
Inc be quashed and set aside and that the indictment  
be and the same is hereby dismissed as to  
all the defts and exceptions allowed to all aggrieved parties (draft) Woodward, J.

AUG 17 Filed Citation - Judge Woodward

AUG 17 Filed Statement of Jurisdiction, Opinion and  
Order

AUG 17 Order that United States of America be and it



RECORDED IN THE OFFICE OF THE CLERK OF THE COURT

FOR THE DISTRICT OF COLUMBIA

ON AUGUST 20, 1939.

RECORDED FOR CERTIFICATION BY RICHARD J. WOODWARD, JR.

FILED NOTICE, BOMBERG & MUNIZ, ATTORNEYS.

FILED MOTION.

FILED NOTICE, MAYES, COOPER & FISHER, ATTORNEYS.

FILED MOTION.

MOTION FOR LEAVE TO REFILE ORDER OF AUGUST 17,

1939, BY RICHARD J. WOODWARD, JR., ATTORNEY.

BOMBERG & MUNIZ, ATTORNEYS, FILED. 11:00 AM.

RICHARD J.

RECORDED FOR CERTIFICATION.

RECORDED FOR CERTIFICATION BY RICHARD J. WOODWARD, JR.

RECORDED FOR CERTIFICATION BY RICHARD J. WOODWARD, JR.

RICHARD J.

RICHARD J.

WOODWARD, JR.

RECORDED FOR CERTIFICATION - BOMBERG

COPY

SEP 18 1939

CHARLES L. DRESSEL, JR.

No. 397

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In the Supreme Court of the United States

OCTOBER TERM, 1939

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THE UNITED STATES OF AMERICA, APPELLANT

v.

THE BORDEN COMPANY, CHARLES L. DRESSEL,  
HARRY M. RESER, ET AL.

---

APPEAL FROM THE DISTRICT COURT OF THE UNITED  
STATES FOR THE NORTHERN DISTRICT OF ILLINOIS

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STATEMENT AS TO JURISDICTION

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**In the District Court of the United States,  
Northern District of Illinois, Eastern  
Division**

No. 31197

**UNITED STATES OF AMERICA**

v.

**THE BORDEN COMPANY, ET AL., DEFENDENTS**

**STATEMENT OF JURISDICTION**

In compliance with Rule 12 of the Supreme Court of the United States, as amended, the United States of America submits herewith its statement particularly disclosing the basis upon which the Supreme Court has jurisdiction upon appeal to review the judgment entered in this cause.

A. The statutory jurisdiction of the Supreme Court to review by direct appeal the judgment entered in this cause is conferred by Title 18, U. S. C., Section 682, Act of March 2, 1907, c. 2564, 34 Stat. 1246, as amended, otherwise known as the Criminal Appeals Act, and by Title 28, U. S. C., Section 345.

B. The statute of the United States, the construction of which is involved herein, is Section 1 of the Sherman Act of July 2, 1890, c. 647, 26 Stat.

(1)

209 (U. S. C., Title 15, Section 1). The pertinent provisions of Section 1 of the Sherman Act follow:

Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal \* \* \*. Every person who shall make any contract or engage in any combination or conspiracy hereby declared to be illegal shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding \$5,000, or by imprisonment not exceeding one year, or both said punishments, in the discretion of the court.

C. The judgment of the District Court sought to be reviewed was entered on July 28, 1939, and a petition for appeal was filed on August 17, 1939, and is presented to the District Court herewith, to wit, on the seventeenth day of August 1939;

The indictment in this case is in four separate counts, each of which is based on Section 1 of the Sherman Act of July 2, 1890, c. 647, 26 Stat. 209 (U. S. C., Title 15, Section 1). The first count of the indictment charges that commencing in the month of January 1935 and continuously thereafter until the presentation of the indictment, the defendants engaged in an unlawful combination and conspiracy in restraint of trade and commerce in fluid milk among the several states by fixing, maintaining, and controlling prices to be paid to producers of fluid milk. The second count of the

indictment charges a similar combination and conspiracy in restraint of trade and commerce in fluid milk among the several states by fixing and maintaining prices at which fluid milk is sold in the City of Chicago. The third count of the indictment charges a similar combination and conspiracy in restraint of trade and commerce in fluid milk among the several states by determining and controlling the distribution of fluid milk in the City of Chicago. The fourth count of the indictment charges a similar combination and conspiracy in restraint of trade and commerce in fluid milk among the several states by controlling the supply of fluid milk entering the City of Chicago.

Demurrers and motions to quash the indictment interposed by the defendants were sustained by the District Court as to all counts of the indictment. By its order and judgment the Court held that certain demurrers and motions to quash must be sustained as to the first, second, and fourth counts of the indictment on the ground that no indictment will lie under Section 1 of the Sherman Act, Title 15, U. S. C., Section 1 (Act of July 2, 1890, 26 Stat. 209), with respect to the production and marketing of agricultural products, including milk, because the production and marketing of agricultural products are removed from the purview of the Sherman Act of 1890, Title 15, U. S. C., Section 1 (Act of July 2, 1890, 26 Stat. 209), by the Act of May 12, 1933 (48 Stat. 31), as amended August 24, 1935 (49 Stat. 750), and as reenacted and amended by the

Agricultural Marketing Agreement Act of 1937  
(50 Stat. 246), 7 U. S. C., Supp. IV, Par. 601 *et seq.*

The Court also held as to Counts One, Two, Three, and Four that, insofar as the Pure Milk Association, its officers and agents, are concerned, no indictment will lie under Section 1 of the Sherman Act, Title 15, U. S. C., Section 1 (Act of July 2, 1890, 26 Stat. 209), with respect to the production and marketing of agricultural products, including milk, because Section 6 of the Clayton Act (Act of October 15, 1914, 15 U. S. C. 17), Sections 1 and 2 of the Capper-Volstead Act (Act of February 15, 1922), 7 U. S. C., Section 291, and the Agricultural Adjustment Act of May 12, 1933 (48 Stat. 31), as amended August 24, 1935 (49 Stat. 750), and as reenacted and amended by the Agricultural Marketing Agreement Act of 1937 (50 Stat. 246), 7 U. S. C., Supp. IV, Par. 601 *et seq.*, when properly construed exempt the Pure Milk Association, an agricultural cooperative association, together with its officers and agents, from prosecution under Section 1 of the Sherman Act of 1890 (Act of July 2, 1890, 26 Stat. 209).

The Third Count is here involved only insofar as demurrers interposed by the Pure Milk Association, its officers and agents, were sustained.

The following decisions sustain the jurisdiction of the Supreme Court upon appeal to review a judgment in this cause on the ground that the said judgment is based upon the construction of the statute upon which the indictment is founded:

*United States v. Patten*, 226 U. S. 525.

*United States v. Pacific and Arctic Ry. Co.*,  
228 U. S. 87.

*United States v. Schrader's Son, Inc.*, 252  
U. S. 83.

*United States v. Kapp*, 302 U. S. 214.

It may also be suggested that the jurisdiction of this Court may be sustained on the ground that the judgment of the District Court is one sustaining a special plea in bar, when the defendants have not been put in jeopardy. See: *United States v. Celestine*, 215 U. S. 278; *United States v. Barber*, 219 U. S. 72; *United States v. Oppenheimer*, 242 U. S. 85; *United States v. Thompson*, 251 U. S. 407; *United States v. Goldman*, 277 U. S. 229.

The question decided by the District Court is a substantial and important one, and has not hitherto been settled by a decision of the Supreme Court of the United States. It is contrary to the decisions of the Supreme Court of the United States in *Swift and Company v. United States*, 196 U. S. 375; *United States v. American Tobacco Co.*, 221 U. S. 106; *United States v. Patten*, 226 U. S. 525; *Local 167 v. United States*, 291 U. S. 293; *Sugar Institute v. United States*, 297 U. S. 553, where the violations of the Sherman Act involved matters of marketing agricultural commodities, and it is believed to be in conflict with the principle that relief under the Sherman Act does not depend upon the existence of some administrative remedy enumerated in the decisions of the Supreme Court of the

United States in *United States v. Trans-Missouri Freight Assn.*, 166 U. S. 290; *United States v. Joint Traffic Assn.*, 171 U. S. 505; *United States v. Union Pacific R. R. Co.*, 226 U. S. 61; *United States v. Pacific and Arctic Ry. Co.*, 228 U. S. 87.

Appended hereto is a copy of the opinion of the Court filed July 13, 1939.

Respectfully submitted.

(Signed) ROBERT H. JACKSON,  
Solicitor General.

(Signed) LEO F. TIERNEY,  
Special Assistant to the Attorney General.

(Signed) WILLIAM J. CAMPBELL,  
United States Attorney, Northern District  
of Illinois, Eastern Division.

**EXHIBIT "A"**

**In the District Court of the United States,  
Northern District of Illinois, Eastern  
Division**

**No. 31197**

**UNITED STATES OF AMERICA**

*v.*

**THE BORDEN COMPANY, ET AL.**

**OPINION**

*July 13, 1939*

**WOODWARD, District Judge:** This matter comes up on the several demurrers and motions to quash an indictment in four counts, charging fourteen corporations and associations and forty-three individuals with engaging in an unlawful combination and conspiracy in restraint of interstate commerce in fluid milk in violation of Section 1 of the Sherman Act (15 U. S. C. A. 1).

The averments of the indictment may be condensed and summarized as follows:

The city of Chicago, Illinois, has a population in excess of three and one-half million people. In excess of a million quarts of fluid milk are distributed and sold each day in the city of Chicago.

The production of milk destined for ultimate distribution and sale as fluid milk in the city of Chicago, its transportation to the city, its preparation for distribution and sale within the city, and its distribution and sale within the city are regulated by an ordinance of the city of Chicago and by rules and regulations promulgated by the Board of Health. Under the ordinance and under the regulations of the Board of Health, fluid milk distributed and sold in the city of Chicago must be produced on a dairy farm approved by the Board of Health. Such dairy farm is known as an approved dairy farm.

In the states of Illinois, Indiana, Michigan, and Wisconsin there are more than fifteen thousand approved dairy farms. More than fifty percent of the approved dairy farms are located in states other than Illinois. Of the fluid milk produced on approved dairy farms, approximately 40 percent is produced on approved dairy farms in Indiana, Michigan, and Wisconsin.

Fluid milk produced on approved dairy farms is transported to Chicago in two ways:

(a) From approved dairy farms to country stations where it is commingled and combined with fluid milk from other approved dairy farms and thereafter transported from the country stations to Chicago by motor vehicle or by railroad; and

(b) Directly from approved farms by motor vehicle.

Fluid milk by its nature is perishable. It cannot be stored and it must reach the consumer within a short time after its production. Pursuant to the ordinance of the city of Chicago and to the rules and regulations of the Board of Health, all fluid milk transported to Chicago for sale and distribution therein must be delivered daily to a place, premise, or establishment where milk is collected preparatory to pasteurization elsewhere, or to a pasteurization plant where milk is handled or otherwise prepared for distribution and sale as fluid milk.

More than one hundred twenty-five distributors, some of whom are made defendants under the designation "major distributors," purchase fluid milk from producers for distribution and sale in the city of Chicago. The major distributors commingle the fluid milk from Indiana, Michigan, and Wisconsin with milk produced in Illinois and then sell the commingled milk in Chicago as one product.

The individual defendants, except a police officer of the city of Chieago, the officers of the Chicago Board of Health, and two arbitrators, are associated with or employed by the corporation and association defendants.

Each of the major distributors is an Illinois corporation engaged in the sale and distribution of fluid milk in the city of Chicago. Approximately sixty-five percent of the fluid milk sold in the city of Chicago is sold by the major distributors. All

major distributors maintain country stations in states outside of Illinois, receive fluid milk at such country stations and transport it to Chicago.

The Associated Milk Dealers, Inc., is an Illinois corporation. Substantially all the members of the Associated Milk Dealers, Inc., are distributors doing business in the city of Chicago. The major distributors dominate and control its activities.

The Pure Milk Association is a corporation organized under The Cooperative Marketing Act of Illinois. It has a membership in excess of twelve thousand producers, approximately fifty percent of whom are located outside of Illinois.

It is constituted the sole and exclusive agent for marketing the milk of its members. In excess of eighty percent of the milk produced by its members is produced on approved dairy farms, seventy-five percent of which is purchased by the major distributors.

The Milk Dealers Bottle Exchange is an Illinois corporation. The major distributors own in excess of eighty percent of its outstanding capital stock and dominate and control its activities and business. It is engaged in collecting, exchanging, and distributing milk bottles, cans, and other containers used by distributors. Special discounts are allowed to stockholders which are not allowed to nonstockholders on charges for services rendered.

The Milk Wagon Drivers Union, Local 753, International Brotherhood of Teamsters, Chauf-

feurs, Stablemen, and Helpers of America is a voluntary unincorporated association and is affiliated with the American Federation of Labor. Its members are employed by distributors in connection with the distribution and sale of fluid milk in the city of Chicago. Approximately 75 percent of all its employed members are employed by the major distributors.

Daniel A. Gilbert is a public officer of the city of Chicago.

The officers of the Board of Health are charged with the administration of the milk ordinance of the city of Chicago and the rules and regulations promulgated thereunder.

The two arbitrators were members of an arbitration board which arbitrated a dispute between the major distributors and the Pure Milk Association.

The indictment charges that commencing in the month of January 1935, and continuously thereafter until the presentation of the indictment, the defendants engaged in an unlawful conspiracy in restraint of trade and commerce in fluid milk among the several States.

#### COUNT ONE

Count one charges a conspiracy

to arbitrarily fix, maintain, and control artificial and noncompetitive prices to be paid to all producers by all distributors for all fluid milk produced on approved dairy

farms located in the States of Illinois, Indiana, Michigan, and Wisconsin, and shipped to Chicago.

The means and methods whereby the conspiracy was intended to be effected are set forth at length. It is necessary to state only the general scheme. The major distributors, the Pure Milk Association and the Associated Milk Dealers, fixed and agreed upon uniform terms and conditions for the purchase of fluid milk from the Pure Milk Association, including price provisions. Through price letters and a monthly periodical, the Pure Milk Association fixed the prices to be paid for fluid milk by all independent distributors to independent producers. The arbitrator defendants sat on a board of arbitration which arbitrated a dispute between the Pure Milk Association and the major distributors. The Bottle Exchange discriminated against distributors who used to purchase fluid milk at the prices thus fixed. Local 753, its adviser, and the police officer, by threats, intimidation, and acts of violence interfered with the business of independent distributors. The Board of Health defendants gave preferential treatment to member-producers and discriminated against independent producers.

The gravamen of the offense charged in this count is the fixing, maintaining, and controlling of prices to be paid fluid-milk producers.

## COUNT TWO

Count two charges a conspiracy "to fix and maintain by common and concerted action, uniform, arbitrary, and noncompetitive prices for the sale by the distributors in the city of Chicago of fluid milk shipped into the said city from the states of Illinois, Indiana, Michigan, and Wisconsin."

Again the means and methods are set forth at length. The major distributors, the Pure Milk Association and the Associated Milk Dealers, agreed and fixed upon uniform, arbitrary, and non-competitive prices to be exacted from and paid to the purchasers of fluid milk. This agreement was executed by the major distributors. Its effect was to compel independent distributors to exact a like price from their customers. The Pure Milk Association refused to sell fluid milk to distributors who would not maintain the fixed price. Substantially the same allegation is made as to the arbitrator defendants as is made in Count one. The Bottle Exchange discriminated against distributors who refused to maintain the fixed price. Local 753, its adviser and the police officer, interfered by threats, intimidation, and violence, with independent distributors not conforming to the fixed price standard. The Board of Health defendants gave preferential treatment to producers who sold to distributors maintaining the fixed prices and imposed

unreasonable burdens on distributors who refused conformity.

The gravamen of the offense charged in this count is the fixing and maintaining of prices at which fluid milk is sold in Chicago.

### COUNT THREE.

Count three charges a conspiracy

(a) "to hinder and to prevent prospective and independent distributors from engaging in the business of distributing fluid milk in the city of Chicago;

(b) "to hinder and to prevent existing independent distributors from distributing fluid milk in the city of Chicago in competition with the major distributors;

(c) "to hinder and to prevent the distribution of fluid milk to stores and by stores in the city of Chicago; and

(d) "to hinder and to prevent any distribution of fluid milk in the city of Chicago, except by the method and in the manner determined by said defendants."

Likewise the means and methods are set forth somewhat at length. The major distributors refrained from competing with each other for customer accounts; refused a stop served by any other distributor unless allowed to serve such stop exclusively; and by means of cash payments, loans, gifts, special discounts, and other securities obtained the privilege of serving stops exclusively. The Associated Milk Dealers adopted and enforced

a rule requiring independent distributors to refrain from taking stops of major distributors. The Pure Milk Association refused to sell fluid milk to independent distributors who attempted to take the stops of major distributors and did other things to hinder the business of independent distributors. The arbitrator defendants rendered the arbitration award hereinbefore referred to. The Milk Dealers Bottle Exchange delayed the return of bottles of independent distributors and refused to sell independent distributors corporate stock. Local 753, its adviser and the police officer, by a series of threats, coercion, and violence hindered and delayed independent distributors in their business of distributing fluid milk in the city of Chicago. The Board of Health defendants, acting arbitrarily, imposed onerous burdens on the distribution of fluid milk in the city of Chicago by independent distributors.

The gravamen of the offense charged in this count is the determination and control of the distribution of fluid milk in Chicago.

#### COUNT FOUR

Count four charges a conspiracy—

to restrict, limit, and control, and to restrain and obstruct the supply of fluid milk moving in the channels of interstate commerce into the city of Chicago from the states of Illinois, Indiana, Michigan, and Wisconsin.

As in the other counts means and methods whereby the conspiracy charged as to be effected are set forth. The Pure Milk Association enforced a base surplus plan of production by which it limited the total production of fluid milk by member producers and did other incidental acts to enforce the base surplus plan. The major distributors entered into agreements with the Pure Milk Association whereby the base surplus plan might be effected. The arbitrator defendants did the acts hereinbefore referred to. The Associated Milk Dealers acted in concert with the Pure Milk Association to enforce the base surplus plan. The Bottle Exchange delayed and refused to return milk bottles and containers to independent distributors who refused to sell their milk through the Pure Milk Association. Local 753, their adviser and the police officer, by threats, intimidation, and coercive measures, exerted their influence against independent distributors to carry out the base surplus plan. The Board of Health defendants gave preferential treatment and imposed arbitrary burdens upon independent producers. The count further states that

"the said base-surplus plan of payment was intended to and does restrict, limit, and control, restrain, and obstruct the supply of fluid milk entering the city of Chicago by arbitrarily limiting the quantity of fluid

milk for which a member-producer may be paid at base price."

The gravamen of the offense charged in this count is the control of the supply of fluid milk permitted to be brought to Chicago.

As ground for motion to quash the indictment, most of the defendants contend that the indictment having been returned at the October, 1938, term of court, was returned by an illegal and invalid grand jury.

The facts upon which this contention is made are as follows:

The terms for the District Court of this Division are fixed by statute to be held on the first Mondays in February, March, April, May, June, July, September, October, and November and the third Monday in December (28 U. S. C. A. 152).

The grand jury that returned the indictment was impaneled and sworn at the July 1938 term of this court. On August 31, 1938, the grand jury appeared as a body in open court before Judge Woodward and presented a petition praying for an order authorizing the grand jury to sit during the September Term

to finish investigations begun but not finished by the said July 1938 grand jury, and which said investigation cannot be finished during the said July 1938 grand jury term of court.

On the same day Judge Woodward entered an order, based upon such petition, authorizing the July 1938 grand jury

to sit during the September Term for the purpose of finishing said investigations.

Near the close of the September 1938 term it became apparent to the grand jury that they could not complete their labors during that term, the grand jury appeared as a body in open court before Judge Wilkerson praying for an order authorizing them to sit during the October 1938 term. Acting on that petition Judge Wilkerson, during the September Term, entered an order authorizing the grand jury

to continue to sit during the October 1938 term of court for the purpose of finishing said investigations.

The applicable statute reads as follows:

"A district judge may, upon request of the district attorney, or of the grand jury or on his own motion, by order authorize any grand jury to continue to sit during the term succeeding the term at which such request is made solely to finish investigations begun but not finished by such grand jury, but no grand jury shall be permitted to sit in all during more than three terms" (28 U. S. C. A. 421).

Under the authority of this statute the grand jury can sit for a total of three terms of court. The limitations upon this right are that (a) a

grand jury can be continued beyond its original term solely to finish investigations begun but not finished during the term for which it was authorized to sit, and (b) the continuance granted by the court can be only for one term at-a time. The petitions and orders are clearly within the statute. The grand jury was a lawful grand jury and had full authority to return the indictment in this case.

Some hyper-critical objections are made as to the form of the order, but these objections are without merit.

The motion to quash the purported service of process upon Borden-Wieland, Inc., must be allowed. It appears that a corporation known as Borden-Wieland, Inc., was organized under the laws of Delaware. On January 4, 1936, Borden-Wieland, Inc., together with other corporations, was merged into a corporation known as Borden's Dairy Products Company, Inc. Thereafter all of the assets of Borden's Dairy Products Company, Inc., were transferred to The Borden Company, a New Jersey Corporation. On February 11, 1936, Borden's Dairy Products Company, Inc., was dissolved. Borden's Dairy Products Company, Inc., is not a defendant. The merger was effected under the corporation law of Delaware which, by Section 60, provides in part

When an agreement shall have been signed, acknowledged, filed and recorded \* \* \* for all purposes of the laws of the State, the separate existence of all the constituent cor-

porations parties to said agreement, or all of such constituent corporations except the one into which the other or others of such constituent corporations have been merged, as the case may be, shall cease \* \* \*

The effect of this section of the act is to terminate the separate existence of all the constituent merging corporations, except the one into which they have been merged. *Title Guaranty Loan & Trust Co. v. Alabama By-Products Corp.*, 214 Ala. 486; *Greaser v. Phoenix Finance Co.*, 218 Ia. 1112.

Under this statute the existence of Borden-Wieland, Inc., was terminated on the date of the merger, namely, January 4, 1936. The corporate existence of Borden-Wieland, Inc., having ceased on January 4, 1936, this court cannot obtain jurisdiction over it by service of process on its purported assistant secretary.

Counts I, II, and IV may be considered together. These counts deal with the relationship between the producer and distributor of fluid milk. That relationship is the only basis upon which the government predicates the theory that interstate commerce in fluid milk exists whereby a conspiracy under the Sherman Act may be charged. In substance these counts charge that the defendants engaged in a combination and conspiracy to restrain trade and commerce in fluid milk among the several states (1) by fixing and maintaining prices to be paid to producers; (2) by fixing and maintaining

prices to be charged by distributors to consumers; and (3) by restraining, limiting, and controlling the supply of fluid milk moving in interstate commerce by means of what is known as the base surplus plan. Price fixing is the essence of these counts.

The basic act is the Sherman Act under which this prosecution is sought to be maintained. The Sherman Act forbids noncompetitive control of prices in interstate commerce, without regard to the desirability of price stability, or the intent of the parties, or the benefit to the public, or the reasonableness of the price fixed.

The Sherman Act has been in force nearly fifty years. During that time sweeping changes in the nation's social and economic problems have been wrought. These changing social and economic problems are reflected in the statute law, both national and state. The Sherman Act embodies the philosophy of individualism and unrestrained competition. Statutory law, since the enactment of the Sherman Act, reflects a change in the fundamental concept on which the Sherman Act is based. The tendency of later legislation has embodied the philosophy of collectivism and control of harmful competition. With the relative wisdom of these essentially incompatible philosophies, the courts have no concern. It is the duty and concern of the courts to construe and apply the applicable constitutional enactments of the political branch of the government.

The first act which makes a departure from, or an exception to, the Sherman Act was the Clayton Act of October 15, 1914 (15 U. S. C. A. 17). By that act labor, agricultural or horticultural cooperative organizations were excepted from the broad and sweeping terms of the Sherman Act. Such cooperative organizations, in and of themselves, were not to be construed as illegal combinations or conspiracies in restraint of trade under the anti-trust laws.

The next radical departure from the theory of the Sherman Act was the Capper-Volstead Act of February 18, 1922 (7 U. S. C. A. 291). This act legalizes price fixing for those within its purview. To that extent it modifies the Sherman Act. It removes from the Sherman Act those organizations, cooperative in their nature, which come within the purview of the Capper-Volstead Act. Prior to the Capper-Volstead Act farmers were treated no differently than others under the anti-trust laws, so far as price fixing was concerned.

This act goes much further than section 6 of the Clayton Act. It is much broader in scope. The Capper-Volstead Act legitimatizes, for agricultural cooperative associations, specified powers and purposes. It provides that associations, qualified under its terms, may process, prepare for market, handle and market in interstate and foreign commerce the products of their members; that they may have marketing agencies in common and that

they may make the necessary contracts and agreements to carry out such purposes.

Section 2 (7 U. S. C. A. 292) recognizes that co-operative associations, in the exercise of the powers conferred upon them by section 1, may monopolize or restrain interstate trade. It confers upon the Secretary of Agriculture the power, after complaint, notice and hearing, to issue a "cease and desist" order when he finds that "the price of any agricultural product is unduly enhanced by reason" of such association monopolizing or restraining trade in interstate or foreign commerce.

The Capper-Volstead Act does not condemn any kind of monopoly or restraint of trade, or any price fixing, unless such monopoly or price fixing unduly enhances the price of an agricultural product. The Act then, by section 2 thereof, commits to an officer of the executive department, the Secretary of Agriculture, the power of regulation and visitation.

Under this act farmers are favored under the anti-trust laws in that they are given a qualified right, free from any criminal liability, to combine among themselves to monopolize and restrain interstate trade and commerce in farm products and to fix and enhance the price thereof.

This is the first statute, to which the attention of the court has been called which, with reference to farmer's cooperatives, embodies the theory of exec-

utive regulation and control of price or profit. The theory and philosophy of unrestrained competition is departed from and, in its stead, is substituted the theory of governmental regulation of combinations and prices. The control is vested in the Secretary of Agriculture, subject, however, under Section 2, to review by the courts. The court deduces from the Capper-Volstead Act that the Secretary of Agriculture has exclusive jurisdiction to determine and order, in the first instance, whether or not farmer cooperatives, in their operation, monopolize and restrain interstate trade and commerce

to such an extent that the price of any agricultural product is unduly enhanced.

Until the Secretary of Agriculture acts, the judicial power cannot be invoked.

The Cooperative Marketing Act of July 2, 1926 (7 U. S. C. A. 455), in this connection, is not of particular significance. It was probably declaratory of the law as it existed in that cooperative organizations were authorized to control and disseminate crop, marketing, statistical, and economic information. However, it does show a closer and more intimate contact with the government in that the government through the Farm Credit Administration in the Department of Agriculture was created for the purpose of acting as a clearing house for cooperatives.

The Agricultural Adjustment Act of May 12, 1933, known as AAA (48 Stat. 31; 7 U. S. C. A. 601 et seq.), together with its amendment of August 24, 1935 (c. 641, 49 Stat. 750) and the Agricultural Marketing Agreement Act of June 3, 1937 (Ch. 296, 50 Stat. 246) witnessed the most marked departure from the theory of the Sherman Act.

The Agricultural Adjustment Act of 1933, in some of its material features, was held invalid in the case of *United States v. Butler*, 297 U. S. 1. The decision in this case affected only the production control and the processing tax provisions of the act of 1933. The act of 1933, as amended in 1935, contained provisions relative to the marketing of agricultural products. The decision in the *Butler case, supra*, cast some doubt on the validity of the marketing provisions of the several acts. To cure the infirmities, if any, in the marketing provisions of the Agricultural Adjustment Act, the Congress enacted into separate legislation the marketing and order provisions of the Agricultural Adjustment act. The Congress, therefore, by the act of June 3, 1937, enacted the Agricultural Marketing Agreement Act (Ch. 296, 50 Stat. p. 246). It reenacted, affirmed, and validated, without material change, the provisions of the Agricultural Adjustment Act, as amended, relating to marketing agreements and orders. The Agricultural Marketing Agreement Act has been held valid in the cases of *U. S. v. Rock Royal Co-Operative*,

*Inc. and H. P. Hood & Sons, Inc. v. U. S. et al*, by opinions of the Supreme Court handed down June 5, 1939.

The original Agricultural Adjustment Act (48 Stat. 31), was passed by Congress to relieve the then economic depression in the basic industry of agriculture. The act was preceded by a declaration of emergency in which it was recited that the normal currents of commerce in agricultural commodities have been burdened and obstructed by the severe disparity between the prices of agricultural commodities and the prices of industrial products, which disparity has resulted in the substantial destruction of the purchasing power of farmers for industrial products and the breaking down of the orderly exchange of all commodities. It therefore declared that

these conditions in the basic industry of agriculture have affected transactions in agricultural commodities with a national public interest.

The Agricultural Marketing Agreement Act (7 U. S. C. A. 601) makes substantially the same declaration, namely, that transactions in agricultural commodities affect "a national public interest." The Congress then proceeds, by the purview of the act which follows the declaration of emergency, to remedy this deplorable condition. The act provides in detail how the "national public interest" in transactions affecting agricultural commodities shall be conserved, protected, and advanced.

Following the declaration of emergency and a statement of the conditions confronting agriculture and industry, the policy which was intended to be effected, the end to be accomplished, is stated clearly and succinctly:

To establish and maintain such orderly marketing conditions for agricultural commodities in interstate commerce as will establish prices to farmers at a level that will give agricultural commodities a purchasing power with respect to articles that farmers buy, equivalent to the purchasing power of agricultural commodities in the base period (7 U. S. C. A. 602 (1)).

Another declared policy was that of protecting the interest of the consumer by

approaching the level of prices which it is declared to be the policy of Congress to establish in subsection (2) of this section by gradual correction of the current level at as rapid a rate as the Secretary of Agriculture deems to be in the public interest and feasible in view of the current consumptive decline in domestic and foreign markets  
\* \* \* (7 U. S. C. A. 602 (2)).

The declared policy of Congress, therefore, was directed towards the protection and stabilization of transactions in agricultural commodities. In construing and applying the Agricultural Adjustment Act, as amended, and the Agricultural Marketing Agreement Act, the policy of Congress, as stated both in the declaration of emergency and in the

declaration of policy, must constantly be borne in mind.

This express policy of the Congress was intended to be put into practical execution. Its practical execution was to be had

through the exercise of the powers conferred upon the Secretary of Agriculture under this chapter (7 U. S. C. A. 602 (1)).

The base period for agricultural commodities, with exceptions not here material

shall be the pre-war period, August 1909-July 1914 (7 U. S. C. A. 602 (1)).

In order to execute the declared policy of the act, the Secretary of Agriculture is vested with power to enter into marketing agreements. The statute reads:

In order to effectuate the declared policy of this title, the Secretary of Agriculture shall have the power, after due notice and opportunity for hearing, to enter into marketing agreements with processors, producers, associations of producers, and others engaged in the handling of any agricultural commodity or product thereof, only with respect to such handling as is in the current of interstate or foreign commerce or which directly burdens, obstructs, or affects, interstate or foreign commerce in such commodity or product thereof. The making of any such agreement shall not be held to be in violation of any of the anti-trust laws of the United States, and any such agreement

shall be deemed to be lawful \* \* \* (7 U. S. C. A. 608b).

Not only is the Secretary of Agriculture vested with power to enter into marketing agreements with producers and handlers, but also he is charged with the mandatory duty, under given circumstances, to enter orders (7 U. S. C. A. 608c (1)).

The statute reads:

The Secretary of Agriculture *shall*, subject to the provisions of this section, issue, and from time to time amend, orders applicable to processors, associations of producers, and others engaged in the handling of any agricultural commodity or product thereof specified in subsection (2) of this section (7 U. S. C. A. 608c (1)).

Among other commodities to which orders "shall be applicable," milk (7 U. S. C. A. 608c (2)).

It will be noted that the Secretary of Agriculture is empowered to enter into marketing agreements, but that he is required to enter orders (7 U. S. C. A. 608b and 608c (1)).

The object of the order is that of regulation of the handling of agricultural commodities which are in interstate commerce. Again, a mandatory duty is imposed on the Secretary of Agriculture. The statute says that the "orders *shall* regulate," the limitation being that the orders shall apply only to interstate or foreign commerce. The statute reads:

Such orders *shall regulate*, in the manner hereinafter in this section provided, only

such handling of such agricultural commodity, or product thereof, as is in the current of interstate or foreign commerce, or which directly burdens, obstructs, or affects, interstate or foreign commerce in such commodity or product thereof (7 U. S. C. A. 608c (1)).

Before an order can be issued, preliminary steps must be taken. There must be notice and an opportunity for a hearing (7 U. S. C. A. 608c (3)). There must be a finding by the Secretary of Agriculture based upon evidence introduced at such hearing,

that the issuance of such order and all the terms and conditions thereof will tend to effectuate the declared policy of this chapter with respect to such commodity \* \* \* (7 U. S. C. A. 608c (4)).

When an order is issued with a marketing agreement, it does not become effective until the handlers of not less than 50 percent of the volume of the commodity within the area of the order have signed the marketing agreement, and does not become effective until approved by at least two-thirds of the producers by number, or by producers who have produced for market at least two-thirds of the volume of such commodity (7 U. S. C. A. 608c (8)). The approval by a cooperative agency is considered the approval of its members (7 U. S. C. A. 608c (12)). However, an order may become effective notwithstanding its disapproval by the handlers if

the Secretary of Agriculture, with the approval of the President, determines (1) that the failure of the handlers to sign the marketing agreement

tends to prevent the effectuation of the declared policy of this chapter with respect to such commodity or product;

(2) that the issuing of such order is the only practical means of advancing the interests of the producers of such commodity and is approved or favored (a) by two-thirds of the producers, or (b) by producers who have produced two-thirds of the volume of the commodity (7 U. S. C. A. 608c (9) (A) (B)).

If a handler feels that an order is not in accordance with law, he is entitled, on petition, to a hearing by the Secretary of Agriculture, after which the Secretary of Agriculture must make a ruling

which shall be final, if in accordance with law (7 U. S. C. A. 608c (15) (A)).

This order is subject to judicial review (7 U. S. C. A. 608c (15) (B)).

Orders are required to contain one or more of the following terms and conditions: (1) prohibiting unfair methods of competition and unfair trade practices; (2) providing for the selection of an agency which shall have the power (a) to administer the order, (b) to make rules and regulations to carry out the order, (c) to investigate complaints or violations, and (d) to recommend amendments (7 U. S. C. A. 608c (7)).

In the case of milk and its products, special terms and conditions must be contained in the order. These terms and conditions are set forth quite at length. A recital of such terms and conditions is not pertinent to the inquiry before this court, and hence the court contents itself with a mere reference to the statute (7 U. S. C. A. 608c (5)).

Jurisdiction is given to the District Court.

to enforce, and to prevent and restrain any person from violating any order, régulation, or agreement, heretofore or hereafter made or issued pursuant to this chapter (7 U. S. C. A. 608a (6)).

Provision is also made for a criminal prosecution against a handler who violates the provision of any order (7 U. S. C. A. 608c (14)).

Provision is further made whereby the Secretary of Agriculture may terminate or suspend the operation of an order. The wording of the statute is:

The Secretary of Agriculture shall, whenever he finds that any order issued under this section, or any provision thereof, obstructs or does not tend to effectuate the declared policy of this title, terminate or suspend the operation of such order or such provision thereof (7 U. S. C. A. 608c (16) (A)).

Section 611 (7 U. S. C. A. 611) declares the conditions upon which any product shall be excluded

from the operations of the law. In order to remove the marketing of any such agricultural products from the operations of the law, the Secretary must first institute an investigation. He must give notice and an opportunity for interested parties to be heard. If, after such investigation, notice, and hearing, he concludes that the conditions of production, marketing, and consumption are such that, during any period, the law cannot be effectively administered to the end of effectuating the declared policy with respect to such commodity, then

the Secretary of Agriculture shall exclude from the operation of the provisions of this chapter, during any period, any such commodity. \* \* \*

This section contains the only provision whereby the marketing of any basic agricultural commodity, including milk, may be exempted from the jurisdiction and control of the Secretary of Agriculture. Until the Secretary invokes the power of investigation, notice and hearing, conferred upon him by this section, the basic agricultural commodity, so far as the marketing thereof is concerned, remains where the statute put it, namely, in the Secretary of Agriculture.

The Agricultural Marketing Agreement Act was designed to improve the marketing of agricultural products, including milk, under the supervision and regulation of the Department of Agriculture.

The act is wider in content than the Capper-Volstead Act. It extends to both distributors and producers. It placed both producers and distributors of agricultural products, including milk, under the exclusive control of the Secretary of Agriculture.

Vast powers were conferred upon the Secretary of Agriculture with relation to the production, distribution, and marketing of agricultural products, including milk. The theory of the act is to improve the condition of agriculture throughout the United States under the supervision, direction, and regulation of the Secretary of Agriculture. To attain this end powers commensurate with his duty and responsibility are vested in the Secretary. Under the Agricultural Marketing Agreement Act of June 3, 1937 the Secretary of Agriculture is vested with full and plenary power to enter into marketing agreements with both the producers, handlers, and distributors of agricultural products.

A study of the statutory policy from the Sherman Act of 1890 to the Agricultural Marketing Agreement Act of 1937 shows a constant and growing tendency on the part of Congress to control and regulate the production and marketing of agricultural products, including milk, through the administrative agency of the Secretary of Agriculture. The whole theory and policy of the Agricultural Marketing Agreement Act is that of governmental control, regulation, and supervision. The production and marketing of agricultural products, including milk, has, so far as interstate commerce

is concerned, been removed from the sphere of trade and barter in a free agency to a status of dependence and obedience to the supreme, exclusive, and plenary control of the Secretary of Agriculture, subject to judicial review in the mode prescribed by the statute.

The Court holds that, by the Agricultural Marketing Agreement Act the Congress has committed to the Executive Department, acting through the Secretary of Agriculture, full, complete, and plenary power over the production and marketing, in interstate commerce, of agricultural products, including milk.

To what extent he should act, the quantum of regulation, is solely one for his judgment and decision. If conditions require, he must act; if they do not require action, then all marketing conditions are deemed satisfactory and the purpose of the act is effectuated. Nonaction by the Secretary of Agriculture, in any given marketing area, is equivalent to a declaration that the policy of the act, in that area, is being carried out. If the policy of the act, in any given milk area, is being violated it becomes the duty of the Secretary of Agriculture to intervene and invoke the powers conferred upon him by the act.

It results, from what has been said, that the power of regulation, supervision and control of the milk industry, in any given milk shed, is, by the Agricultural Marketing Agreement Act of 1937, vested exclusively in the Secretary of Agriculture.

It follows further that the Secretary of Agriculture cannot by his own action, or inaction, divest himself of this power so long as the statute remains in force. The marketing of the agricultural products, including milk, covered by the Agricultural Marketing Agreement Act, is removed from the purview of the Sherman Act. In other words, so far as the marketing of agricultural commodities, including milk, is concerned, no indictment will lie under section 1 of the Sherman Act.

The question of whether or not the indictment charges that the combination and conspiracy restrained trade and commerce in fluid milk among the several states has been extensively and ably argued on both sides, the government contending that the averments of the indictment plainly charge a combination and conspiracy in restraint of interstate commerce and the defendants contending that the indictment, properly analyzed and considered, fails to charge a combination and conspiracy in restraint of interstate commerce. It will be perceived, however, from what has been stated, that as the Counts one, two, and four of the indictment it is unnecessary to decide whether or not the allegations of the indictment show that interstate commerce was or was not restrained. If the marketing of milk in the Chicago milkshed burdens, obstructs, or affects interstate commerce in fluid milk then, as above concluded, the merchandising thereof was subject to the plenary and exclusive control of the Secretary of Agriculture

through marketing agreements or orders made pursuant to the Agricultural Marketing Agreement Act. If, on the other hand, the acts charged in the indictment do not burden, obstruct, or affect interstate commerce in fluid milk, then plainly no offense under the Sherman Act has been charged under Counts one, two, and four.

The demurrs to Counts one, two, and four must, therefore, be sustained.

The averments of Count three have hereinbefore been set forth.

This count charges at least four separate, different, and independent conspiracies or combinations. This is not a case of one conspiracy accomplished by several acts; it is several independent conspiracies. Each of the conspiracies affects different individuals or affects the same individuals in entirely different situations.

It is one thing to hinder and prevent prospective independent distributors from engaging in the business of distributing fluid milk. It is entirely different to hinder and prevent existing independent distributors from distributing fluid milk in Chicago in competition with the major distributors. To hinder and prevent distribution of fluid milk to stores and by stores in the city of Chicago is different from any conspiracy previously charged in this count. To hinder and prevent any distribution of fluid milk in the city of Chicago, except by the method and in the manner determined by said defendants, is also conspiracy sharply differ-

entiated from the three conspiracies previously charged in this indictment.

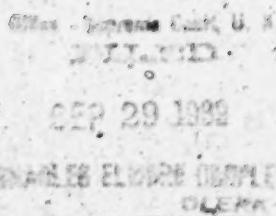
This count is challenged as bad for duplicity. The Court believes the challenge to be well taken and holds that the count charges at least four distinct and separate conspiracies, and not a single conspiracy.

Moreover, this count deals with "independent distributors" and stores. It is also challenged on the ground that the supposed restraints therein described do not affect any interstate commerce. The indictment alleges generally the origin of fluid milk transported into Chicago from Illinois, Indiana, Michigan and Wisconsin. It further alleges that all the major distributors have country stations outside of Illinois and transport, or cause to be transported, milk received in such stations to Chicago. The indictment is lacking as to averments or allegations as to the origin of fluid milk sold by stores or independent distributors. It is only by intentment and inference that the Court could conclude from an examination of the indictment that the conspiracy charged in Count three had any effect on interstate commerce. It is only by such intentment and inference that the Court could conclude that the stores and independent distributors whose system of distribution the defendants are alleged to have controlled, sold fluid milk which was or had been the subject of interstate commerce. It is a fundamental of criminal pleading that an indictment must allege directly and with certainty

every essential element or ingredient of the offense. If any essential element or ingredient of the crime is omitted, such omission cannot be supplied by intendment or implication. (*Pettibone v. U. S.*, 148 U. S. 197; *U. S. v. Carney*, 228 Fed. 163).

The demurrer to Count three, therefore, must be sustained.

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No. 397

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In the Supreme Court of the United States

OCTOBER TERM, 1939

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UNITED STATES OF AMERICA, PETITIONER

v.

THE BORDEN COMPANY ET AL.

---

APPEAL FROM THE DISTRICT COURT OF THE UNITED  
STATES FOR THE NORTHERN DISTRICT OF ILLINOIS

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MOTION BY THE UNITED STATES TO ADVANCE

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## MOTION BY THE UNITED STATES TO ADVANCE

The Solicitor General, pursuant to Rule 20, paragraphs 3 and 4, of this Court; moves to advance the above-entitled cause for hearing at the earliest date convenient to the Court.

This appeal was taken under the Criminal Appeals Act, and under Section 238, paragraph 2, of the Judicial Code, as amended by the Act of February 13, 1925, from the judgment of the District Court sustaining demurrers and motions to quash interposed by the defendants to the indictment.

The indictment was based upon the Sherman Antitrust Act and consisted of four counts. The District Court determined that no indictment

would lie under Section 1 of the Sherman Act as to certain defendants on the ground that the production and marketing of agricultural products, including milk, have been removed from the purview of the Sherman Act by the Agricultural Adjustment Act, as amended, and as reenacted and amended by the Agricultural Marketing Agreement Act of 1937. The District Court further determined that no indictment would lie under Section 1 of the Sherman Act as to the Pure Milk Association, an agricultural cooperative organization, its officers and agents, with respect to the production and marketing of agricultural products, including milk, because Section 6 of the Clayton Act, Sections 1 and 2 of the Capper-Volstead Act, and the Agricultural Adjustment Act, as amended, and as reenacted and amended by the Agricultural Marketing Agreement Act of 1937, when properly construed exempt the Pure Milk Association, together with its officers and agents, from prosecution under Section 1 of the Sherman Act. This decision involves a construction of the Sherman Act insofar as it applies to combinations and conspiracies in restraint of interstate trade and commerce in agricultural products, including milk.

The question as to the application of the Sherman Act to the production and marketing of agricultural commodities is one of great public interest. The confusion resulting from the unsettled state of the law is materially interfering with the enforce-

ment of the antitrust laws. It is manifestly important that a decision should be rendered promptly, and that the case should not be obliged to await its regular call on the docket.

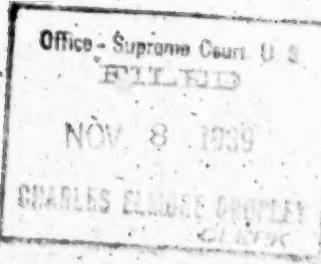
For these reasons, and as the Criminal Appeals Act directs that appeals thereunder "shall be diligently prosecuted and shall have precedence over all other cases," this motion to advance is respectfully submitted.

Notice of this motion has been served on counsel for the appellees, and proof of service filed with the clerk of this Court.

ROBERT H. JACKSON,  
*Solicitor General.*

OCTOBER 1939.

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BRIEF FOR THE UNITED STATES

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DIVISION

BRIEF FOR THE UNITED STATES

OPINION BELOW

The opinion of the District Court (R. 98-113) is  
not yet reported.

JURISDICTION

The jurisdiction of this Court is invoked under  
the Act of March 2, 1907, c. 2564, 34 Stat. 1246,  
U. S. C., Title 18, Section 682, as amended, other-  
wise known as the Criminal Appeals Act, and  
under Section 238 of the Judicial Code as amended  
by the Act of February 13, 1925, c. 229, 43 Stat. 936,

U. S. C., Title 28, Section 345. The order and judgment of the Court below was entered on July 28, 1939 (R. 114-118). The order allowing appeal was entered on August 17, 1939 (R. 94-95). On October 16, 1939, this Court postponed further consideration of the question of jurisdiction to the hearing of the case on the merits.

#### STATUTES INVOLVED

The statute primarily involved is Section 1 of the Sherman Act of July 2, 1890, c. 647, 26 Stat. 209, as amended by the act of August 17, 1937, c. 690, 50 Stat. 693, U. S. C., Title 15, Section 1, which, so far as pertinent here, provides:

Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal. \* \* \* Every person who shall make any contract or engage in any combination or conspiracy hereby declared to be illegal shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding \$5,000, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court.

In construing the Sherman Act the Court below also considered the following statutory provisions:

The Agricultural Adjustment Act of May 12, 1933, c. 25, 48 Stat. 31, as amended August 24, 1935,

c. 641, 49 Stat. 750, and as reenacted and amended by the Agricultural Marketing Agreement Act of 1937, c. 296, 50 Stat. 246, 7 U. S. C., Supp. IV, Section 601, *et seq.* (hereinafter referred to as the "Marketing Agreement Act"). An annotated compilation of the Act is attached to this brief as Appendix A.

Section 6 of the Clayton Act of October 15, 1914, c. 323, 38 Stat. 730, U. S. C., Title 15, Section 17.

The Capper-Volstead Act of February 18, 1922, c. 57, 42 Stat. 388, U. S. C., Title 7, Sections 291, 292.

The pertinent provisions of the last two mentioned acts and of the Criminal Appeals Act are set forth in Appendix B.

#### **QUESTIONS PRESENTED**

1. Whether this Court has jurisdiction of this appeal under the Criminal Appeals Act.
2. Whether the Agricultural Marketing Agreement Act removes the production and marketing of agricultural products, including milk, from the purview of Section 1 of the Sherman Act.
3. Whether Section 6 of the Clayton Act, the Capper-Volstead Act, and the Agricultural Marketing Agreement Act, exempt a cooperative association, engaged in the production and marketing of agricultural products, from prosecution under Section 1 of the Sherman Act.

**STATEMENT***A. The Indictment*

On November 1, 1938, the appellees were indicted in the United States District Court for the Northern District of Illinois, Eastern Division, on four counts, each charging an unlawful combination and conspiracy in restraint of interstate trade and commerce, in violation of Section 1 of the Sherman Act (R. 1-30). The trade and commerce involved is the transportation to the Chicago market of fluid milk produced for that market on dairy farms located in Illinois, Indiana, Michigan, and Wisconsin, and the distribution of the milk in that market (R. 3, par. 24).

The indictment describes in general terms the production of milk for the Chicago market; its transportation to, and distribution in, that market; and the extent to which those operations are regulated by ordinances of the City of Chicago (R. 2-4). Under these regulations fluid milk distributed in the City of Chicago must be produced on a dairy farm approved by the Board of Health. The indictment alleges, among other things, that in the States of Illinois, Indiana, Michigan, and Wisconsin there are more than 15,000 dairy farms approved by the Board of Health of the city for the shipment of fluid milk to the Chicago market; of these farms more than 50%, producing approximately 40% of all fluid milk coming

from approved dairy farms, were located in States other than Illinois (R. 2-3, pars. 16-23).

The defendants named in the indictment fall into five groups:

(1) *Distributors and allied groups.*<sup>1</sup>—This group of defendants includes—

(a) Ten corporations, hereinafter referred to as major distributors, which sell approximately 65% of the fluid milk sold in the city of Chicago; each of these corporations purchases a substantial quantity of fluid milk outside of Illinois and transports it to Chicago (R. 4, pars. 25-28);

(b) Certain officers and agents of the major distributors (R. 5-6, par. 29);

(c) The Associated Milk Dealers, Inc., a trade association of milk distributors, and certain of its officers and agents (R. 6-7, pars. 30-33);

(d) The Milk Dealers Bottle Exchange, a corporation controlled by the major distributors, which collected and distributed milk

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<sup>1</sup> These defendants are: The Borden Co., Borden-Wieland, Inc., Bowman Dairy Co., Sidney Wanzer & Sons, Inc., Hunding Dairy Co., Capitol Dairy Co., Western-United Dairy Co., Western Dairy Co., Inc., United Dairy Co., International Dairy Co., D. B. Peck, Francis H. Kullman, Jr., M. J. Metzger, H. T. Adamson, J. F. Philippi, H. W. Comfort, S. M. Ross, Charles L. Dressel, Harry M. Reser, W. A. Baril, O. O. Smaha, R. W. Nessler, F. A. Webb, Gordon B. Wanzer, H. Stanley Wanzer, Carl W. Hunding, Hyman I. Freed, Louis G. Glick, Maurice S. Dick, Samuel S. Dick, Louis Janata, Paul Potter, Otto Black, and Sidney Wanzer III.

bottles and other containers used by distributors (R. 8-9, pars. 37-38).

(2) *The Pure Milk Association, and certain of its officers and agents.*<sup>2</sup>—This is an association of milk producers incorporated under "The Cooperative Marketing Act of Illinois," which has a membership of over 12,000 producers, approximately 50% of whom are located outside the State of Illinois (R. 7, par. 34). More than 80% of the milk produced by members of this association was produced on municipally approved dairy farms, and approximately 75% of the milk so produced was purchased by the major distributors (R. 8, par. 35). This association acted as marketing agent for its members (R. 8, par. 35).

(3) *Milk Wagon Drivers Union, Local 753, and certain labor officials.*<sup>3</sup>—This union has more than 5,000 members engaged in the distribution of milk in the City of Chicago; more than 75% of its members were employed by the major distributors (R. 9-10, pars. 39, 40, 41, 42).

(4) *Municipal Officials.*<sup>4</sup>—This group includes the President of the Board of Health of the City

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<sup>2</sup> The officers and agents of the Pure Milk Association indicted are: Don N. Geyer, Edward F. Cooke, E. E. Houghtby, F. J. Knox, Lowell D. Oranger, and John P. Case.

<sup>3</sup> The labor officials indicted are: Robert G. Fitchie, James Kennedy, Steve Sumner, Fred C. Dahms, F. Ray Bryant, John O'Connor, David A. Riskind, and Leslie G. Goudie.

<sup>4</sup> This group of defendants consists of: Herman N. Bundersen, Paul Krueger, William J. Guerin, and Daniel A. Gilbert.

of Chicago, two subordinate officials of the Board whose duties relate to the approval and inspection of dairy farms, and a police officer (R. 10, par. 43).

(5) *The Arbitrators.*<sup>5</sup>—Two persons who arbitrated a dispute between the major distributors and Pure Milk Association and, in the course of that arbitration, fixed the price for fluid milk to be paid by the major distributors to the members of the Pure Milk Association (R. 10, par. 44).

The period of time involved in each of the four counts of the indictment begins in the month of January 1935 and continues thereafter up to and including the date of the return of the indictment, November 1, 1938 (R. 1, par. 1).

The first count charges that all the defendants—

\* \* \* unlawfully have combined and conspired together and engaged with one another to arbitrarily fix, maintain, and control artificial and non-competitive prices to be paid to all producers by all distributors for all fluid milk produced on approved dairy farms located in the States of Illinois, Indiana, Michigan, and Wisconsin, and including all fluid milk so produced and shipped from the States of Illinois, Indiana, Michigan, and Wisconsin into the said city of Chicago [R. 11, par. 47].

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<sup>5</sup> The arbitrators were Leland Spencer and W. A. Wentworth.

The means and methods by which the combination and conspiracy in Count One was intended to be effected and was effected are detailed in paragraphs 48-61 (R. 11-16).

The second count charges that all the defendants—

\* \* \* unlawfully have combined and conspired together and engaged with one another to fix and maintain by common and concerted action, uniform, arbitrary and non-competitive prices for the sale by the distributors in the City of Chicago of fluid milk shipped into the said City from the States of Illinois, Indiana, Michigan, and Wisconsin [R. 17, par. 63].

The means and methods by which the combination and conspiracy charged in Count Two was intended to be effected and was effected are detailed in paragraphs 64-74 (R. 17-20).

The third count charges that all the defendants—

\* \* \* unlawfully have combined and conspired together and engaged with one another to hinder and to prevent prospective independent distributors from engaging in the business of distributing fluid milk in the City of Chicago, to hinder and to prevent existing independent distributors from distributing fluid milk in the City of Chicago in competition with the major distributors, to hinder and to prevent the distribution of fluid milk to stores and by stores in the City of Chicago, and to hinder and to prevent any

distribution of fluid milk in the City of Chicago, except by the method and in the manner determined by said defendants [R. 21, par. 76].

The means and methods by which the combination and conspiracy in Count Three was intended to be effected and was effected are detailed in paragraphs 77-86 (R. 21-24).

The fourth count charges that all the defendants—

\* \* \* unlawfully have combined and conspired together and engaged with one another and with divers other persons to restrict, limit, and control and to restrain and obstruct the supply of fluid milk moving in the channels of interstate commerce into the City of Chicago from the States of Illinois, Indiana, Michigan, and Wisconsin [R. 25, par. 88].

The means and methods by which the combination and conspiracy charged in Count Four was intended to be effected and was effected are detailed in paragraphs 89-98 (R. 25-29).

#### *B. Defendants' Demurrers and Motions to Quash*

Demurrers and motions to quash, presenting various objections to the indictment, were interposed by each of the defendants (R. 31-93). On July 28, 1939, these demurrers and motions to quash were sustained by the District Court as to all counts of the indictment and the indictment was dismissed.

as to all defendants (R. 114). By its order and judgment, the court held that certain of the demurrers and motions to quash must be sustained as to the first, second, and fourth counts of the indictment on the ground that no indictment will lie under Section 1 of the Sherman Act with respect to the production and marketing of agricultural products, including milk, because the production and marketing of such products are removed from the purview of the Sherman Act by the Agricultural Marketing Agreement Act (R. 115)..

The court also held as to Counts One, Two, Three, and Four that, in so far as the Pure Milk Association, its officers and agents, are concerned, no indictment will lie under Section 1 of the Sherman Act with respect to the production and marketing of agricultural products, including milk, because when Section 1 of the Sherman Act is construed in the light of Section 6 of the Clayton Act, the Capper-Volstead Act, and The Agricultural Marketing Agreement Act, it appears that the Pure Milk Association, as an agricultural cooperative association, is exempt from prosecution under Section 1 of the Sherman Act (R. 116).

The court also sustained demurrers to the third count of the indictment on two independent grounds, viz. duplicity in charging at least four separate and distinct conspiracies and failure definitely to allege a restraint of interstate commerce (R. 116-117).

The court below overruled the demurrers and motions to quash interposed by all defendants as to Counts One, Two, and Four, in so far as they challenged these counts on the ground that interstate commerce was not involved and as to all counts, in so far as they challenged the constitutionality of the Sherman Act, the sufficiency of the allegations of unlawful conspiracy, and on all other grounds not specifically overruled or sustained (R. 117).

### *C. Limitations Upon Issues Involved*

The case of *United States v. Hastings*, 296 U. S. 188, is authority for two principles governing appeals under the Criminal Appeals Act, which restrict the issues involved in this appeal in the following manner:

1. Count Three is eliminated from consideration on this appeal by application of the principle that this Court will refuse to entertain an appeal under the Criminal Appeals Act from a judgment of the District Court quashing an indictment where the judgment was based not only upon the invalidity or construction of the statute upon which the indictment was founded, but also upon another and independent ground. It has already been noted that the District Court sustained demurrers to the third count on the independent grounds of duplicity and failure definitely to allege a restraint of interstate commerce. *United States v. Hastings*, 296 U. S. 188, 193, 194.

2. Conversely, as to Counts One, Two, and Four, this appeal involves no question of the construction of the indictment or of its sufficiency merely as a pleading as distinguished from the construction of the Sherman Act upon which the District Court founded its decision. *United States v. Hastings*, 296 U. S. 188, 192.

It is noted above that the District Court overruled all demurrers and motions to quash interposed as to Counts, One, Two, and Four insofar as they challenged the sufficiency of the allegations and on all other grounds except the particular grounds involving the construction of the Sherman Act with respect to the exemption therefrom of agricultural products and agricultural cooperative associations. It is clear, therefore, that the case comes before this Court in the posture of an indictment sufficient to state an offense in all respects in the manner charged, unless the acts charged in those counts are excluded from the purview of the Sherman Act on the grounds found by the District Court.

#### SPECIFICATION OF ERRORS TO BE URGED

The District Court erred:

1. In sustaining the various joint and several demurrers, motions to quash and special pleas of the defendants The Borden Company, H. W. Comfort, S. M. Ross, Charles L. Dressel, Harry M. Reser, W. A. Baril, O. O. Smaha, R. W. Nessler, F. A. Webb, W. A. Wentworth, Bowman Dairy

Company, D. B. Peck, Francis H. Kullman, Jr., M. J. Metzger, H. T. Adamson, J. F. Philippi, Hunding Dairy Company, Carl W. Hunding, Capitol Dairy Company, Hyman I. Freed, Sidney Wanzer & Sons, Inc., H. Stanley Wanzer, Gordon B. Wanzer, International Dairy Company, Louis Janata, Western-United Dairy Company, Western Dairy Company, Inc., United Dairy Company, Louis G. Glick, Maurice S. Dick, Samuel S. Dick, Milk Dealers Bottle Exchange, Associated Milk Dealers, Inc., Paul Potter, Otto Black, Milk Wagon Drivers' Union, Local 753, International Brotherhood of Teamsters, Chauffeurs, Stablemen and Helpers of America, Robert G. Fitchie, James G. Kennedy, Steve C. Sumner, Fred C. Dahms, F. Ray Bryant, John O'Connor, David A. Riskind, Leslie G. Goudie, Daniel A. Gilbert, Pure Milk Association, Don N. Geyer, Edward F. Cooke, E. E. Houghtby, F. J. Knox, Lowell D. Oranger, John P. Case, Leland Spencer, Herman N. Bundesen, Paul Krueger, and William Guerin interposed to the first, second, and fourth counts of the indictment in the above entitled cause.

2. In sustaining said demurrers, motions to quash, and special pleas interposed to the first, second, and fourth counts of the indictment in the above entitled cause, on the ground that no indictment will lie under Section 1 of the Sherman Act, c. 690, 50 Stat. 693, U. S. C., Title 15, Section 1, with respect to the production and marketing of agricultural products, including milk, because the

production and marketing of agricultural products, including milk, are removed from the purview of the Sherman Act by the Agricultural Adjustment Act of May 12, 1933, c. 25, 48 Stat. 31, U. S. C., Title 7, Section 601 *et seq.*, as amended August 24, 1935, c. 641, 49 Stat. 750, U. S. C., Title 7, Section 601 *et seq.*, and as reenacted and amended by the Agricultural Marketing Agreement Act of June 3, 1937, c. 296, 50 Stat. 246, U. S. C., Title 7, Supp. IV, Par. 601 *et seq.*

3. In sustaining the joint and several demurrers and special pleas of the defendants Pure Milk Association, Don N. Geyer, Edward F. Cooke, E. E. Houghtby, F. J. Knox, Lowell D. Oranger, and John P. Case which were interposed as to Counts One, Two, and Four of the indictment in the above entitled cause, on the ground that no indictment will lie under Section 1 of the Sherman Act, c. 690, 50 Stat. 693, U. S. C., Title 15, Section 1, with respect to the production and marketing of agricultural products, including milk, because Section 6 of the Clayton Act, c. 323, 38 Stat. 730, U. S. C., Title 15, Section 17; Sections 1 and 2 of the Capper-Voistead Act, c. 57, 42 Stat. 388, U. S. C., Title 7, Sections 291, 292; and the Agricultural Adjustment Act of May 12, 1933, c. 25, 48 Stat. 31, U. S. C., Title 7, Section 601, *et seq.*, as amended August 24, 1935, c. 641, 49 Stat. 750, U. S. C., Title 7, Section 601 *et seq.* and as reenacted and amended by the Agricultural Marketing Agreement Act of June 3, 1937, c. 296, 50 Stat. 246, U. S. C., Title 7, Supp. IV, Section 601, *et seq.*, when properly construed, ex-

empt the Pure Milk Association, an agricultural cooperative association, together with its officers and agents, from prosecution under Section 1 of the Sherman Act.

4. In dismissing Counts One, Two, and Four of the indictment in the above entitled cause as to all of the defendants.

#### SUMMARY OF ARGUMENT

##### I

The judgment of the District Court was based upon the construction of Section 1 of the Sherman Act upon which the indictment was founded. The decision is no less a construction of the Sherman Act because the District Court construed that Act in the light of other statutes to determine its application to the acts charged in the indictment. It follows that this Court has jurisdiction of the appeal under the Criminal Appeals Act.

Moreover, such jurisdiction may be sustained on the additional ground that the judgment is one sustaining a special plea in bar and the defendants have not been put in jeopardy.

##### II

The acts charged in the indictment are illegal under the Sherman Act and are not exempt from its application by reason of the provisions of other statutes. The Sherman Act by its terms applies to commerce in agricultural products, including milk. Immunity from the application of the Sherman Act cannot be implied but must be expressly

granted and none of the statutes enacted since the Sherman Act confers immunity from its application to commerce in agricultural products.

There is a fundamental misconception in the opinion of the court below that the policy of the agricultural legislation represents a trend contrary to the policy of the Sherman Act. There is no foundation for this theory of inconsistency between the statutes. On the contrary, these acts show a positive legislative intention to further the objectives of the Sherman Act and to accomplish its practical enforcement with respect to agricultural products. The Sherman Act permits reasonable combinations and reasonable restraints upon interstate commerce. The agricultural legislation aids the application of the Sherman Act to agricultural products by clarifying the legislative conception of what are reasonable combinations and reasonable restraints on commerce in agricultural commodities. One of the criteria for determining the reasonableness of any restraint is whether it contributes to or impedes the orderly marketing of the product without destroying effective competition. Another criterion is whether the combination is necessary to confer equality of bargaining power upon those marketing their goods or services. The agricultural legislation provides legislative recognition that certain marketing practices when carried out under responsible public supervision, are reasonable aids to collective bargaining and

efficient distribution of agricultural products under responsible public supervision and defines certain reasonable combinations effective to these ends to which, and to which alone, the statutes make it clear that the prohibition of the Sherman Act shall not apply. In making these provisions Congress has protected the principle of the anti-trust laws by providing for positive and direct administrative regulation where it permits combinations to be operative for these limited purposes. The error of the court below in assuming an inconsistency between the policy of the Sherman Act and the later agricultural legislation vitiates the premises upon which the opinion below is based.

Moreover, as a matter of statutory construction, none of the acts passed since the Sherman Act exempts commerce in agricultural products generally from the Sherman Act. The court below did not rely upon any legislation prior to the Marketing Agreement Act to establish the exemption upon which it based the decision in this case, but found such an exemption by implication from the scheme of regulation provided for in the Marketing Agreement Act. The terms of the Marketing Agreement Act make it clear that no general exemption was intended.

The Marketing Agreement Act expressly exempts from the antitrust laws only marketing agreements entered into under the Act and meetings held, and awards and agreements made in the

course of arbitration proceedings conducted in accordance with the specific provisions of the Act. The terms of these exemptions and the legislative history of the Act make it clear that Congress did not intend to confer immunity from the Sherman Act generally upon all commerce in agricultural products, but intended instead merely to make it clear that certain of the methods provided in the Act for accomplishing its limited purposes were not subject to the antitrust laws. None of the acts charged in the indictment was committed pursuant to, or under the color of, the provisions of the Marketing Agreement Act.

Furthermore, the stated policy of the Marketing Agreement Act is limited to such regulation of interstate commerce as is necessary to raise prices paid to farmers for their products to a parity specified in the Act. It is clear from its stated policy that the Act does not seek to accomplish general and complete regulation of interstate commerce in agricultural commodities. Finally, the methods of regulation for which the Act provides are not adapted to complete regulation of commerce in agricultural products; their use is expressly limited to the accomplishment of the limited stated purpose of the Act.

Taken as a whole, the terms of the Act, its stated policy, and its legislative history make it clear that Congress did not intend to exempt commerce in agricultural products from the Sherman Act.

## III

The Capper-Volstead Act does not exempt the Pure Milk Association, as an agricultural cooperative association, from the provisions of the Sherman Act. The Capper-Volstead Act, by its terms and by its legislative history, shows a purpose merely to provide farmers with an adequate form of business organization enabling them to bargain collectively with large-size business corporations in marketing their products. It does not give them any general immunity from the application of the antitrust statute. Certainly it confers no immunity from prosecution for the kind of acts charged in the indictment in this case. Section 2 of the Act, empowering the Secretary of Agriculture to issue a cease-and-desist order in case such an association unduly enhances the price of any product, is an anti-profiteering provision which circumscribes the privilege of action by farmers conferred by Section 1 of the same Act. Section 2 has as its purpose the direct control of unreasonable prices; this purpose is not coextensive with the purpose of the Sherman Act. Section 2 of the Capper-Volstead Act supplements rather than displaces the antitrust laws.

## ARGUMENT

## I

THIS COURT HAS JURISDICTION UNDER THE CRIMINAL APPEALS ACT

The judgment of the District Court sustaining the demurrers to the indictment was based upon the construction of Section 1 of the Sherman Act upon

which the indictment was founded (R. 114-118). It follows that this Court has jurisdiction of the appeal under the Criminal Appeals Act. *United States v. Patten*, 226 U. S. 525; *United States v. Pacific & Arctic Ry. Co.*, 228 U. S. 87; *United States v. Schrader's Son, Inc.*, 252 U. S. 83; *United States v. Kapp*, 302 U. S. 214.

Some of the appellees in opposing jurisdiction contend that the judgment was not based upon a construction of the Sherman Act "but upon the validity and interpretation of the several acts of Congress passed subsequent to the enactment of the statute upon which the indictment is founded" (*i. e.*, Clayton Act, Capper-Volstead Act, and Agricultural Marketing Agreement Act).<sup>\*</sup> Other appellees contend that "in spite of the fact that the acts charged would have brought the defendants under the Sherman Act prior to the enactment of the later laws, they are now no longer indictable under the Sherman Act because the new laws have vested the Secretary of Agriculture with sole jurisdiction and have granted a new and exclusive method of prosecuting and punishing such acts."<sup>†</sup> Still other appellees argue that "the agricultural marketing acts have withdrawn initial judicial power from the Federal District Courts over the general subject matter of the production and

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<sup>\*</sup> See paragraph 2 of Statement Opposing Jurisdiction on behalf of Pure Milk Association *et al.*

<sup>†</sup> See Statement Opposing Jurisdiction on behalf of Associated Milk Dealers, Inc., *et al.*

marketing of agricultural commodities, including milk, thereby carving from Section 1 of the Sherman Act any application to such commodities."\*

These arguments that the court did not construe the Sherman Act but merely declined jurisdiction of the offense charged, appear strained and artificial in the face of the express findings in its order and judgment that (a) "the production and marketing of agricultural products are removed from the purview of the Sherman Act" by the Agricultural Marketing Agreement Act (R. 115) and (b) that Section 6 of the Clayton Act, the Capper-Volstead Act, and the Agricultural Marketing Agreement Act "exempt the Pure Milk Association, an agricultural cooperative association, together with its officers and agents, from prosecution under Section 1 of the Sherman Act" (R. 116).

The opinion of this Court in *United States v. Patten*, 226 U. S. 525, gives a succinct answer to the appellees' contention that the District Court did not construe the Sherman Act but merely gave effect to the other acts. In that case, the District Court sustained a demurrer to an indictment under the Sherman Act for running a corner in cotton on the ground that the acts charged were not denounced as criminal by the Sherman Act. Jurisdiction of this Court under the Criminal Appeals Act was opposed on the ground that the judgment

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\* See Statement in Opposition on behalf of Sidney Wanzer & Sons, Inc.

did not involve the construction of the statute. To that contention this Court replied (p. 535):

The court could not have decided, as it did, that the acts charged are not within the condemnation of the statute without first ascertaining what it does condemn, which, of course, involved its construction. Indeed, it seems a solecism to say that the decision that the acts charged are not within the statute is not based upon a construction of it.

The decision in the instant case is no less a construction of the Sherman Act because of the fact that the District Court construed the Sherman Act in the light of other statutes to determine its application to the acts charged. Cf: *United States v. Kapp*, 302 U. S. 214, holding that, in an indictment under a conspiracy statute to violate another statute, a construction of the statute at which the conspiracy is aimed will be treated under the Criminal Appeals Act as a construction of the statute upon which the indictment is founded.

Appellant suggests that if there be any doubt as to the jurisdiction of this Court on the ground discussed, jurisdiction may be sustained on the additional ground that the judgment of the District Court is one sustaining a special plea in bar when the defendants have not been put in jeopardy. See *United States v. Celestine*, 215 U. S. 278; *United States v. Barber*, 219 U. S. 72; *United States v. Oppenheimer*, 242 U. S. 85; *United States v. Thompson*, 251 U. S. 407; *United States v. Goldman*, 277 U. S. 229.

## II

THE ACTS CHARGED IN THE INDICTMENT ARE ILLEGAL UNDER THE SHERMAN ACT AND ARE NOT EXEMPT FROM ITS APPLICATION BY REASON OF THE PROVISIONS OF OTHER STATUTES

*A. The Sherman Act by its terms applies to combinations and conspiracies in restraint of interstate commerce in agricultural products, including milk.*

Section 1 of the Sherman Act provides:

Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal.

It makes illegal every contract, combination, or conspiracy which, in any manner or to any extent, restrains interstate commerce, provided the restraint is unreasonable.<sup>9</sup> No commodities are particularly named. The language is sweeping and unqualified. It applies to all interstate commerce, regardless of the articles which are the subject of such commerce. It is evident beyond question from the terms of the Act that it applies to interstate commerce in agricultural products, such as milk,<sup>10</sup> and it does not appear that the court below construed it otherwise.

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\* *United States v. American Tobacco Co.*, 221 U. S. 106; *Appalachian Coals, Inc. v. United States*, 288 U. S. 344.

<sup>10</sup> Combinations and conspiracies restraining trade and commerce in agricultural products have been held to be

It is also clear that the acts charged in the indictment fall into the category of acts which are illegal under the Sherman Act. Counts One and Two charge that the defendants combined and conspired to fix prices. Such combinations and conspiracies are illegal under the antitrust laws. *United States v. Trenton Potteries*, 273 U. S. 392; *United States v. Trans-Missouri Freight Association*, 166 U. S. 290; *United States v. Sugar Institute*, 297 U. S. 553. Count Four of the indictment charges that the defendants combined and conspired to restrict the supply of milk moving in the channels of interstate commerce into the Chicago market. This kind of activity is likewise patently illegal under the Sherman Act. See *American Column Co. v. United States*, 257 U. S. 377; *Coronado Coal Co. v. United Mine Workers*, 268 U. S. 295, 310.

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illegal as in violation of the Sherman Act in *Sugar Institute v. United States*, 297 U. S. 553; *Local 167 v. United States*, 291 U. S. 293; *Nash v. United States*, 229 U. S. 373; *United States v. Patten*, 226 U. S. 525; *United States v. American Tobacco Co.*, 221 U. S. 106; *United States v. Kissel*, 218 U. S. 601; *Swift and Company v. United States*, 196 U. S. 375; *Greater New York Live Poultry Cham. of Comm. v. United States*, 47 F. (2d) 156; *Live Poultry Dealers' Protective Ass'n v. United States*, 4 F. (2d) 840; *United States v. M. Piowaty & Sons*, 251 Fed. 375; *United States v. King*, 250 Fed. 908, 229 Fed. 275; *United States v. Corn Products Refining Co.*, 234 Fed. 964; *United States v. Whiting*, 212 Fed. 466; *United States v. Swift*, 188 Fed. 92.

*B. Immunity from the application of the Sherman Act cannot be implied by reference to general legislative policy or to asserted inconsistencies in other statutes but must be expressly granted*

The view of the court below appears to be that a series of laws enacted since the Sherman Act, although not expressly exempting agricultural products from the operation of that Act, have so undermined its basic political philosophy with respect to commerce in agricultural products that the Act no longer applies to such commerce—in short, that these later statutes have repealed the Sherman Act, so far as agricultural products are concerned, not expressly but by implication.

This result is in conflict with well-established canons of statutory construction. The courts do not favor repeal by implication. *General Motors Corp. v. United States*, 286 U. S. 49, 61-62; *Henderson's Tobacco*, 11 Wall. 652, 656-657; *United States v. Tynen*, 11 Wall. 88, 92; *Posadas v. National City Bank*, 296 U. S. 497, 503-505.

Furthermore, exemptions from statutes cannot be sustained merely by reference to shifts in general legislative policy but must rest upon a clear statutory expression of the intention to grant the exemption. *United States v. Barnes*, 222 U. S. 513, 520-521; Cf. *Baltimore Nat. Bank v. Tax Comm'n*, 297 U. S. 209, 212-213. Similarly no exemption,

not expressly granted, can be established by reference to asserted inconsistencies in other statutes. *Frost v. Wenie*, 157 U. S. 46, 58; *Henderson's Tobacco*, 11 Wall. 652, 656-657.

These principles have particular force with respect to an exemption such as that found by the court below in this case, which would constitute, in effect, a complete abrogation of the Sherman Act with respect to agricultural products. The difficulty of justifying a determination that the language of a statute is so plainly repugnant to the continued effectiveness of an earlier statutory provision that the two cannot remain simultaneously operative is infinitely magnified where, as in this case, the statute held to be supplanted prescribes a sweeping regulation of a huge field of commerce. In such a case the succeeding statute, if it could in any case be held to repeal the earlier one without explicitly saying so, must at least provide a scheme of regulation plainly applicable to all of the many situations to which the earlier statute applies and must apply to such situations in a way so clearly inconsistent with the continued effectiveness of the earlier statute as to make it plainly evident that Congress did not intend the earlier statute to remain effective. We submit that that is not the case here. As we shall point out, none of the acts subsequent to the Sherman Act expressly exempt the acts charged in this case from the operation of the

Sherman Act and their provisions fall far short of establishing a scheme of regulation which so covers the field regulated by the Sherman Act as to justify a finding that they are repugnant to the continued application of the Sherman Act to commerce in agricultural products. Cf. *Henderson's Tobacco*, 11 Wall. 652, 656-657.

*C. The agricultural legislation instead of representing a trend against the application of the Sherman Act to agricultural products shows a positive legislative policy to further both its objectives and its practical enforcement with respect to agricultural products*

As we have pointed out above it is not within the power of the courts to weave legislation which it considers to be inconsistent into a consistent economic theory by supplying repeal clauses not found in the acts themselves. It is evident that the idea which moved the court below was the thought that it was helping Congress solve the dilemma of inconsistent statutes by reading a repeal of the Sherman Act into the agricultural acts. Unless these laws actually follow inconsistent policies, there is no basis for the judicial repeal of the antitrust laws in the opinion below no matter how broadly one construes the court's power to supply phrases to conform to supposed congressional intention. We insist (1) that the District Court had no power to rewrite these statutes even if they

were inconsistent with the Sherman Act in economic policy, and (2) that there is no foundation for the theory of inconsistency between these statutes, which is the sole basis of the court's assumption of legislative power.

The agricultural legislation involved in this case aids rather than impedes the application of the Sherman Act to agricultural products by clarifying the conception of what are reasonable combinations and reasonable restraints in agricultural production and distribution. The Sherman Act itself does not prohibit reasonable restraints of trade. It has a double function (1) to prevent *unreasonable* restraints and (2) to define the activities of *reasonable* combinations. Broadly speaking, combinations or the exercise of power by combinations, are reasonable where they are necessary for the efficient operation of an industry or the efficient marketing of its goods. The Sherman Act is not intended to stop industrial progress in a machine age. This has been recognized by the courts in enforcing the antitrust laws. It has been recognized by Congress in passing legislation in aid of the antitrust laws.

*One* of the criteria for determining the reasonableness of any combination is whether it contributes to the orderly marketing of a product without destroying effective competition. Another criterion is whether a combination is necessary to raise a particular group of producers to a position

where they have equal bargaining power with others in the marketing of their goods and services. Without concerted action the individual farmer, like the individual laboring man, cannot bargain on anything like an equal basis with competing organizations which buy his goods. It is only by the pooling of strength that the agricultural producer can hold his own. The intention of the Capper-Volstead Act is to give legislative recognition to the reasonableness of collective bargaining by agricultural cooperatives for the mutual benefit of their members. The intention of the Agricultural Marketing Agreement Act is in part to recognize the reasonableness of certain marketing practices as an aid both to collective bargaining and the efficient distribution of agricultural products with appropriate supervision by a responsible public official. That aid goes so far as to put a floor under milk prices, under certain conditions, none of which were in effect when this indictment was filed or when the acts charged in the indictment were committed. The purpose of this aid is to secure parity prices to farmers, without destroying competition or preventing the application of the Sherman Act to activities in the distribution of the product not specifically covered by marketing agreements or orders.

It may be that some of the concerted action approved by Congress in this legislation would have been approved by the courts in the absence of legislation. In any event, it is not inconsistent with an economic interpretation of the rule of reason which Congress is entitled to make.

In *Appalachian Coals Inc. v. United States*, 288 U. S. 344, the Court approved a marketing combination similar in purpose at least to the combinations made legal by the agricultural legislation under discussion. In that case the Court approved of a protective combination of producers for the purpose of obtaining a better competitive position in the chaotic coal industry. Similar economic conditions led to the Congressional recognition that the combined actions of the farmers outlined in these agricultural acts were reasonable.

It is certainly not true that in passing the recent legislation Congress forgot about the Sherman Act and therefore inadvertently omitted a clause exempting agricultural products from its operation. Indeed, it is abundantly clear that the application of the Sherman Act was one of the important issues debated by Congress; that there was no intention of repealing the Act, and that the only intention was to supply the courts with a guide as to what Congress intended to be included within reasonable combinations. The congressional action was taken for the express purpose of ending the uncertainty

of litigation which was an obstacle to the development of farm organizations and the reasonable exercise of their power.

Wherever a combination or concerted action is recognized by the legislature to be legal, the function of the Sherman Antitrust Law is to prevent the unreasonable use of a limited privilege to restrain trade in a way which was not intended in the granting of that privilege. There are no legal privileges which are not subject to this limitation. Even patents and copyrights, though in form absolute monopolies, may be used in violation of the antitrust laws. What is a reasonable use of the patent or copyright depends upon the courts' interpretation of the scope of those privileges. In the recent case of *Interstate Circuit v. United States*, 306 U. S. 208, where an unreasonable use of the copyright privilege was charged, members of this Court differed as to the scope of the copyright laws. Neither the majority nor the dissent, however, even suggested that the exercise of the copyright privilege was not limited in at least some respects by the Sherman Act.

The corporate franchise is another privilege of combination, the reasonable use of which is under the constant supervision of the antitrust laws. The agricultural legislation here discussed was passed for the express purpose of giving farmers the opportunity to combine so that they might be in a competitive position in relation to great corporate

organizations. There is no basis whatever for saying that the use of the *corporate privilege* is subject to the antitrust laws, and the use of *marketing organizations* for farm cooperatives is wholly exempt.

The opinion of the court below holds in effect that Congress, by passing this agricultural legislation, intended to exempt those handling agricultural products from prosecution for every form of unreasonable restraint or unreasonable use of the privileges of combination granted to them. Under this interpretation, a small and aggressive group of farmers could use their organization in combination with the distributors in such a way as to prevent all the rest of the farmers from having any access to the market. Under this interpretation, even if sufficient votes in favor of a marketing order were not obtained, never the less every restraint of trade would be permitted in agricultural products. On the other hand, if a marketing order were put into operation, any use of that order, or of the procedure to obtain the order, which an ingenious buccaneer could devise to obtain a monopoly position, would go unpunished. These results are reached by reading into the agricultural legislation a repeal clause which cannot be found in the printed act which Congress passed.

The fact is that the failure expressly to repeal the Sherman Act is not an inadvertent omission. Congress has guarded the principles of the anti-trust laws because their repeal without substitut-

ing positive and direct administrative regulation in any industrial area means either the establishment of monopoly or the development of a system of cartels with the power to crush all enterprise which opposes them. The recognition of reasonable combinations for limited purposes not inconsistent with a competitive economy is, of course, essential to the administration of the Act, not inconsistent with it. The addition of positive administrative regulation is often required. Yet the antitrust laws still remain, even in such a case, (1) to fill in the gaps where positive administrative regulation does not extend, and (2) to prevent the unreasonable distortion of legislative privileges into restraints of commerce for which they were not designed.

The principle involved here extends far beyond the present case. In an age of increasing organization there is an increasing need to curb the unreasonable use of the peculiar privileges which may be granted to those organizations. Congress has in the past, and will in the future, recognize the necessity of allowing weaker organizations to protect themselves, not in the interest of promoting monopolies or cartels, but in the interest of making it possible for competing groups to survive against their stronger opponents. The so-called fair trade acts, the resale price maintenance acts, the collective bargaining acts for labor, are examples. The principle of legislative interpretation applied by

the court below would permit a privilege of maintaining a retail price of an advertised product to be used as a practical monopoly by a concern which dominated the entire retail field. It would permit the fair trade acts to be used as means of extortion by relieving from penalty a collusive use of that kind of privilege.

Finally, the repeal of the Sherman Act by implication in cases such as this would permit positive regulatory provisions to function without any judicial background of precedents in favor of competition and against unnecessary restraints of trade. Every regulatory statute would have to be complete in itself. Even the Interstate Commerce Act does not cover all the activities of railroads. It, and all other acts like it, were passed against a background of judicial decisions favoring competition which made it unnecessary to cover every possible ramification of the industry. Regulatory acts could no longer proceed step by step leaving unchanged such portions of the law as Congress did not intend to change or portions which escaped its attention.

The traditional policy of Congress expressed in the long line of decisions interpreting the Sherman Act has always been taken as a starting point whenever Congress desired to adapt those principles to the peculiar conditions of a particular industry. The entire opinion of the court below is based on the single idea that Congress desired to abandon

that traditional policy. This error is fundamental and completely vitiates the premise from which the reasoning of the lower court proceeds. The existence of the error which is demonstrable on the surface of the statutes here involved becomes incontrovertible when we examine the statutory provisions in detail.

*1. None of the statutes enacted since the Sherman Act and before the Marketing Agreement Act exempts agricultural products from the operation of the Sherman Act.*

The Clayton Act of October 15, 1914, c. 323, 38 Stat. 730, U. S. C., Title 15, Section 17,<sup>11</sup> provided that agricultural organizations instituted for the purposes of mutual help and not having capital stock or conducted for profit were not to be considered, in and of themselves, illegal combinations or conspiracies in restraint of trade under the antitrust laws. The approval of such combinations does not extend to the acts alleged in Counts One, Two, and Four of the indictment in this case,

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<sup>11</sup> The court below considered the application of Section 6 of the Clayton Act (Act of October 15, 1914, U. S. C., Title 15, Section 17), Appendix B, page 70, and the Capper-Volstead Act (Act of February 15, 1922, U. S. C., Title 7, Sections 291, 292), Appendix B, page 70, only in reference to the demurrers of the Pure Milk Association, an incorporated cooperative association of milk producers, and certain of its officers and agents. The effect of these statutes in their specific relation to those defendants is discussed separately hereafter, *infra* pages 57-68. To avoid repetition of this exception in this part of the argument we shall refer to these statutes in Part II only in relation to their application to the other defendants, none of whom are cooperative associations.

and the court does not rely upon it to sustain its decision as to these counts.

The Capper-Volstead Act of February 18, 1922 (U. S. C., Title 7, Sections 291, 292)<sup>12</sup>, broadens the authorization of the Clayton Act so as to approve of collective action by farmers through corporations having capital stock and operated for profit in preparing their products for market and selling them. The Act in Section 2 adds a provision against profiteering by farm cooperatives which gives the power to the Secretary to act against unduly increased prices of any agricultural products. This provision goes beyond the powers granted in the Sherman Act by permitting a direct attack upon unduly enhanced prices regardless of the legality of the combination. We will discuss the effect of this provision in the part of the brief which deals with the indictment of the cooperative. The court below did not suggest that it had any relevance to the application of the Sherman Act to the acts charged in Counts One, Two, and Four of the indictment.

The court refers to the Cooperative Marketing Act of July 2, 1926, c. 725, 44 Stat. 803, U. S. C., Title 7, Section 455,<sup>13</sup> merely to indicate the establishment of a closer contact between the government and farmers' cooperatives, not as indicating the establishment of any general exemption from the antitrust laws.

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<sup>12</sup> Appendix B, *infra*, page 71.

<sup>13</sup> See R. 106.

Obviously, none of these acts exempts interstate commerce in milk from the application of the Sherman Act, nor does the court below so hold. We believe that far from supporting the decision, the earlier statutes just discussed illustrate the consistent care which Congress has exercised in giving its approval to particular combinations to limit that approval to the particular requirements of the policy immediately sought.

2. *The qualified exemptions from the antitrust laws expressly provided for by the Marketing Agreement Act do not exempt commerce in agricultural products generally from the operation of the Sherman Act.*

The court below based its decision exempting agricultural products from the Sherman Act solely on implication from the scheme of regulation established by the Marketing Agreement Act. It reached this conclusion in the face of the fact that the Marketing Agreement Act not only contained no such general exemption but did contain a qualified exemption, necessary to make valid the plan of regulation, which plainly indicates that Congress did not even consider granting a general exemption. If Congress had intended by the Marketing Agreement Act to exempt commerce in agricultural products from the operation of the Sherman Act it would have done so by clear and explicit language.<sup>14</sup> The Act contains no such language. Instead, it provides two narrowly defined and ex-

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<sup>14</sup> See Clayton Act (U. S. C., Title 15, Section 12, *et seq.*) ; Miller-Tydings Act (U. S. C., Title 15, Section 1) ; Federal

plicitly limited exemptions applicable only to the marketing agreements and arbitration procedures provided for in the Act itself.

Section 8 (b)<sup>15</sup> provides that marketing agreements to which the Secretary is required to be a party, which may be entered into only after notice and public hearing and which are strictly limited to the accomplishment of the express purposes of the Act, shall be exempt from the antitrust laws.

Whatever the scope of this exemption may be, it can not apply in the instant case. The acts charged in the indictment were committed at a time when there was no marketing agreement or order in effect in the Chicago market. Thus, apart from all other considerations, the very terms of the exemption prevent its application to the situation now under discussion.

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Trade Commission Act (U. S. C., Title 15, Section 41, *et seq.*); Shipping Act, 1916, Section 15 (U. S. C., Title 46, Section 814); Packers & Stockyards Act, Section 405 (U. S. C., Title 7); Emergency Railroad Transportation Act of 1933, Section 10 (U. S. C., Title 49); Motor Carriers Act, 1935, Section 212 (U. S. C., Title 15).

<sup>15</sup> Section 8 (b) provides in part:

In order to effectuate the declared policy of this title, the Secretary of Agriculture shall have the power, after due notice and opportunity for hearing, to enter into marketing agreements with processors, producers, associations of producers, and others engaged in the handling of any agricultural commodity or product thereof, only with respect to such handling as is in the current of interstate or foreign commerce or which directly burdens, obstructs, or affects inter-

Furthermore, the effect of the exemption is to establish that the statute did not create any general immunity from the application of the antitrust laws. It is well established that the creation of a specific exemption in a statute negatives any implication that other and broader exemptions were intended by the legislation. An exception in a statute "amounts to an affirmation of the application of its provisions to all other cases not excepted." *Bend v. Hoyt*, 13 Pet. 261, 271-272; *Equitable Life Association v. Clements*, 140 U. S. 223. The clear effect of Section 8 (b) is to establish that no general exemption was intended or made. If this were not plain from the language itself, the legislative history of the section removes all doubt that Congress did not intend the result reached by the court below.

When the bill was introduced in the House, *the marketing agreement exemption provision did not appear in it.*<sup>16</sup> Despite this omission the Committee on Agriculture, in the report which accompanied the bill, stated that "any such agreement

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state or foreign commerce in such commodity or product thereof. *The making of any such agreement shall not be held to be in violation of any of the antitrust laws of the United States,* and any such agreement shall be deemed to be lawful: *Provided,* That no such agreement shall remain in force after the termination of this Act. \* \* \* [Italics supplied.]

<sup>16</sup> H. R. 3835, 73d Cong., 1st sess., 77 Cong. Rec., Part I, page 646.

to which the Secretary has become a party would be a valid agreement under law, and to the *extent of the terms thereof* exempt from the restrictions of the antitrust laws."<sup>17</sup> [Italics supplied.] It is therefore apparent that the Committee which considered the bill and submitted it to the House was of the opinion that in the absence of any express exemption the authorization of the marketing agreements would establish an exemption in favor of those who entered into agreements with the Secretary but only "to the extent of the terms thereof."<sup>18</sup>

An examination of the legislative history of the Act and particularly of the exemption provision leads to these conclusions: (1) the exemption provision was added not because Congress believed that it was absolutely necessary, but out of an abundance of caution and so that no question might arise as to the legality under the antitrust laws of the mere making of a marketing agreement pursuant to the terms of the Act;<sup>19</sup> (2) that great care was taken in framing the exemption provision to make sure

<sup>17</sup> H. R. Rep. 6, 73d Cong., 1st sess., page 4.

<sup>18</sup> This view is in accord with the rule that governmental approval would render such an agreement lawful. *United States v. United States Steel Corp.*, 251 U. S. 417, 446; *Fosburgh v. California & Hawaiian Sugar Refining Co.*, 291 Fed. 29, 36, 37.

<sup>19</sup> See particularly, 77. Cong. Rec. Part II, page 1970; 77 Cong. Rec. Part. II, page 1968.

that no general immunity from the antitrust laws was conferred.<sup>20</sup>

The purpose of Congress not to confer general immunity from the application of the antitrust laws is shown by the following colloquies which took place when the exemption provision was under consideration by the Senate:

**Mr. HEBERT.** If the Senator's amendment shall be adopted, of course, it will abrogate the provisions of the antitrust law to the extent of its application to those commodities enumerated in the bill.

**Mr. NORRIS.** No; not necessarily. I would not put it that broadly. I would say to the extent of the agreement.

**Mr. HEBERT.** To the extent of the agreement as it applies to the commodities covered in the bill.

**Mr. NORRIS.** Yes.<sup>21</sup>

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**Mr. BORAH.** Mr. President, may I ask the Senator from South Carolina if there is any provision in the bill repealing the anti-trust acts?

<sup>20</sup> See particularly, 77 Cong. Rec. Part II, page 1971; 77 Cong. Rec. Part II, page 1970; 77 Cong. Rec. Part II, page 1977; 77 Cong. Rec. Part II, page 1982; 77 Cong. Rec. Part III, page 3022; H. R. Rep. 100, 73d Cong., 1st sess., page 2; 77 Cong. Rec. Part III, page 3024, H. R. Rep. 100, 73d Cong., 1st sess., page 8; 77 Cong. Rec. Part III, page 3066; 77 Cong. Rec. Part III, page 3114; 77 Cong. Rec. Part III, page 3117.

<sup>21</sup> 77 Cong. Rec., Part II, page 1977. Senator Norris introduced the amendment which contained the immunity provision. 77 Cong. Rec. Part II, page 1970.

Mr. SMITH. Oh, no; it does not repeal the antitrust acts. It only provides that where agreements shall be entered into touching any commodities, the antitrust acts will be suspended during the time of the life of such agreements, under such restrictions as the Secretary may make in the agreements themselves.<sup>22</sup>

Mr. BANKHEAD. The clause referred to is designed to provide that only agreements made with the Government shall be exempt from the effects of the antitrust law. It does not permit any agreement among the processors themselves.

Mr. SMITH. Oh, no.<sup>23</sup>

Like the exemption from marketing agreements provided in Section 8 (b) of the Marketing Agreement Act, the exemption provided in Section 3 (a)<sup>24</sup> of that Act is limited to action provided for by the Act itself. It applies only to meetings held and awards and agreements made in the course of

<sup>22</sup> 77 Cong. Rec., Pt. III, page 3117. Senator Smith was Chairman of the Senate Committee on Agriculture, which reported the bill, and a member of the Conference Committee.

<sup>23</sup> 77 Cong. Rec., Pt. III, page 3117. Senator Bankhead was a member of the Senate Committee on Agriculture.

<sup>24</sup> Sec. 3. (a) The Secretary of Agriculture, or such officer or employee of the Department of Agriculture as may be designated by him, upon written application of any cooperative association, incorporated or otherwise, which is in good faith owned or controlled by producers or organizations thereof, of milk or its products, and which is bona fide engaged in collective processing or preparing for market

arbitration proceedings conducted under Section 3 (a) itself. That section provides safeguards for the interests of all parties concerned. Such proceedings differ widely from unrestrained private agreements and the defendants do not suggest that any of the acts charged in the indictment were carried out under the provisions of Section 3 (a) or that they fall within its exemption. Far from sug-

or handling or marketing (in the current of interstate or foreign commerce, as defined by paragraph (i) of section 2 of this act), milk or its products, may mediate and, with the consent of all parties, shall arbitrate if the Secretary has reason to believe that the declared policy of the Agricultural Adjustment Act, as amended, would be effectuated thereby, bona fide disputes, between such associations and the purchasers or handlers or processors or distributors of milk or its products, as to terms and conditions of the sale of milk or its products. The power to arbitrate under this section shall apply only to such subjects of the term or condition in dispute as could be regulated under the provisions of the Agricultural Adjustment Act, as amended, relating to orders for milk and its products.

(b) Meetings held pursuant to this section shall be conducted subject to such rules and regulations as the Secretary may prescribe.

(c) No award or agreement resulting from any such arbitration or mediation shall be effective unless and until approved by the Secretary of Agriculture, or such officer or employee of the Department of Agriculture as may be designated by him, and shall not be approved if it permits any unlawful trade practice or any unfair method of competition.

(d) No meeting so held and no award or agreement so approved shall be deemed to be in violation of any of the antitrust laws of the United States.

gesting a general exemption from the Sherman Act the provisions of Section 3 (a) add to the internal evidence in the statute itself that no general exemption was intended.

*3. The declared policy of the Marketing Agreement Act discloses no intention to exempt agricultural products from the operation of the Sherman Act.*

The Marketing Agreement Act in Section 1 sets out in the following terms the particular situation with which it seeks to deal:

It is hereby declared that the disruption of the orderly exchange of commodities in interstate commerce impairs the purchasing power of farmers and destroys the value of agricultural assets which support the national credit structure and that these conditions affect transactions in agricultural commodities with a national public interest and burden and obstruct the normal channels of interstate commerce.

The conditions in interstate commerce sought to be met are thus clearly stated to be limited to those which affect, or are affected by, the relative purchasing power of farmers.

In Section 2,<sup>25</sup> Congress states its purpose to establish and maintain for agricultural commodities in interstate commerce such orderly marketing conditions as will establish prices to farmers at a level that will give such commodities a purchasing power

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<sup>25</sup> Appendix A.

with respect to articles farmers buy equivalent to the purchasing power of such commodities in a defined base period. Broad as it may be, this purpose does not embrace all aspects of interstate commerce in agricultural commodities. Many factors may affect interstate commerce in such commodities without depressing prices to farmers.

Congress limits this primary purpose by stating also its purpose to protect the interests of consumers by approaching the desired level of prices only gradually and by expressly stating that it authorizes no action designed to maintain prices to farmers above the specified level.<sup>26</sup> There is no expression in this clause of any intent to limit any activities except those provided for in the Act itself as means of carrying out its purpose to enhance farm prices.

Taken together these purposes clearly limit the regulation authorized to action designed to increase the purchasing power of farmers by maintaining adequate prices for their products. The Act purports to do nothing more than that. This falls far short of a purpose to prevent all evils affecting interstate commerce in agricultural commodities which might result from the combinations and conspiracies made illegal by the Sherman Act.

For example, prices to farmers might be enhanced by a program under the Marketing Agree-

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<sup>26</sup> Appendix A.

ment Act without substantially increasing prices to consumers. But even with such a program in effect, private combinations, without materially affecting prices paid to farmers, might contrive so to increase the prices required of consumers as to impede seriously the flow of agricultural products in interstate commerce. Similarly, private combinations, without depressing farm prices, might exclude competitors from the field of distribution, or hold off the market quantities of needed agricultural commodities. \*The Act's statement of policy lacks any expression of intention to regulate commercial restraints or controls carried out by private groups, even where one of its programs is in effect, unless the result of such private activities is to depress farm prices. Even more clearly, its purpose does not include regulation of restraints upon commerce by private combinations where, as in this case, there had been no finding that farm prices would be enhanced by regulation under the Act and where, accordingly, no program was in effect.

The stated purposes of the Act, thus limited as they are, make it evident that they do not replace the Sherman Act or become the sole provision for regulation of interstate commerce in agricultural commodities. Moreover, the powers granted to the Secretary under the Act are carefully limited to action designed to accomplish these stated purposes. As we shall point out they do not expand

the Act's purposes nor give any power to deal with restraints of commerce in agricultural products except those which impede enhancement of farm prices to the parity level.

*4. The methods provided by the Marketing Agreement Act for regulation of interstate commerce in agricultural products disclose no intention to exempt such products from the operation of the Sherman Act*

The Act provides for the regulation of agricultural marketing by two methods—marketing agreements, to which the Secretary must be a party, and orders to be issued by the Secretary.<sup>27</sup>

A marketing agreement may be executed only after notice and a public hearing. No power is given to the Secretary to initiate a marketing agreement nor can he force members of the industry to enter such an agreement. It is purely voluntary and affects only the signers, but the Secretary must be a party to it. If executed independently of an order, it may include any terms or conditions found to effectuate the declared policy of the Act. It may fix prices and marketing practices. Obviously, such an agreement might violate the Sherman Act were

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<sup>27</sup> At the last term in *United States v. Rock Royal Co-operative, Inc.*, decided June 5, 1939, this Court considered the details of the method by which the distribution of milk is regulated through orders under the Marketing Agreement Act. The scheme of regulation was described in the brief of the United States in that case on pages 10-34. Accordingly it will only be summarized here.

it not for the provision in Section 8 (b)<sup>28</sup> that the making of such an agreement shall not be held to be a violation of the antitrust laws.

Orders may be issued with or without the execution of a marketing agreement<sup>29</sup> and, like marketing agreements, may be issued only after notice and opportunity for a hearing.<sup>30</sup> The Secretary is required to issue an order if, on the evidence introduced at the hearing, he finds (in addition to other findings which he is required to make) that the issuance of the order will tend to effectuate the declared policy of the Act.<sup>31</sup> The terms and conditions which may be included in orders regulating the handling of milk are specified in the Act.<sup>32</sup>

Orders may be issued in connection with a marketing agreement only if handlers who handle not less than fifty per cent of the volume of the commodity in the area covered by the order have signed the marketing agreement and only if the Secretary determines that the issuance of the order is approved or favored by at least two-thirds of the producers producing the commodity for sale in the marketing area during a representative period, or by the producers of two-thirds of the volume of the

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<sup>28</sup> Appendix A, and see *supra* pages 37-42.

<sup>29</sup> Sections 8 (c) (8), 8 (c) (9), Appendix A.

<sup>30</sup> Sections 8 (c) (3), 8 (c) (4), Appendix A.

<sup>31</sup> Section 8 (c) (4), Appendix A.

commodity sold during the representative period within the marketing area.<sup>22</sup>

Orders are to be issued notwithstanding the failure of handlers to enter into a marketing agreement, if the Secretary, with the approval of the President, determines (a) that the failure of the handlers to sign the marketing agreement tends to prevent the effectuation of the declared policy of the Act, and (b) that the issuance of the order is the only practicable means of advancing the interest of the producers of the commodity pursuant to the declared policy, and is approved or favored by at least two-thirds of the producers who have been engaged in the production of the commodity covered by the order, or by producers who have produced for market at least two-thirds of the volume of the commodity covered by the order.<sup>23</sup> No order may be issued unless it regulates the handling of the commodity in the same manner as a marketing agreement upon which previously a hearing has been held.<sup>24</sup>

The Act provides for administrative review of the provisions of orders on petition by handlers and for modification of the order or the granting of exemption if the provisions complained of are found not to be in accordance with law. The Sec-

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<sup>22</sup> Sections 8 (c) (5), 8 (c) (7), Appendix A.

<sup>23</sup> Section 8 (c) (9), Appendix A.

<sup>24</sup> Section 8 (c) (10), Appendix A.

retary's ruling on such a petition is subject to review in the district courts of the United States."

The Secretary is required to terminate an order or suspend its operation whenever he finds that it obstructs or does not tend to effectuate the declared policy of the Act," or when he finds that its termination is favored by a majority of the producers affected by the program, who must represent more than fifty percent of the producers of the commodity covered by the marketing agreement or order."

The court below proceeded upon the assumption that the provisions of the Marketing Agreement Act with respect to marketing agreements and orders vested complete jurisdiction and control over the marketing of agricultural commodities in the Secretary of Agriculture, without regard to the desires of producers and handlers.

It is evident from this summary of the powers conferred upon the Secretary that they are not self-executing. The marketing agreements are wholly voluntary. The orders can become effective only upon approval by a specified percentage of producers of the commodity subject to the order and, in the case of orders issued in connection with marketing agreements, upon approval by a specified percentage of handlers of the commodity. More-

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<sup>25</sup> Section 8 (c) (15), Appendix A.

<sup>26</sup> Section 8 (c) (16) (A), Appendix A.

<sup>27</sup> Section 8 (c) (16) (B), Appendix A.

over, the regulation must be terminated if a specified percentage of producers favors its termination. We submit that no scheme of regulation, the object of which is so clearly limited to the enhancement of farm prices of agricultural products that the regulation is made subject to approval by the producers for whose benefit it is enacted and of the handlers whose activities it regulates, can properly be treated as vesting in the Secretary the "full, complete, and plenary power" of Congress over interstate commerce in agricultural commodities. If the grant of power to the Secretary falls short of this, it cannot sustain the decision below.

The limited scope of the Marketing Agreement Act is evident also from the fact that the powers granted to the Secretary cannot be exercised to regulate all phases of interstate commerce in agricultural products for all purposes. The authority to exercise the powers is expressly limited to situations in which it is found that their exercise will tend to effectuate the stated purpose to enhance farm prices of such products.

Marketing agreements are authorized only "in order to effectuate the declared policy."<sup>55</sup> The Secretary may give notice and an opportunity for hearing upon a proposed order only when he has reason to believe that the issuance of an order will tend to effectuate the declared policy.<sup>56</sup> He may

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<sup>55</sup> Section 8 (b), Appendix A.

<sup>56</sup> Section 8 (c) (3), Appendix A.

issue the order only if he finds that its issuance will tend to effectuate the declared policy.<sup>40</sup> He is required to terminate any order whenever he finds that it obstructs or does not tend to effectuate the declared policy.<sup>41</sup> The regions to which orders are to apply are to be determined wholly on the basis of the effectuation of the declared policy.<sup>42</sup> The Act specifies the provisions which may be included in orders.<sup>43</sup> All such provisions are obviously related only to the accomplishment of the declared policy. No other provisions may be included. In the case of milk, orders may require the payment of minimum prices to producers but there is no authority to include provisions for maximum prices to producers or provisions regulating in any way the prices at which milk is sold to consumers. The Secretary is left without power to regulate these factors both of which may directly affect interstate commerce in milk.

However broad the power vested in the Secretary might be in the absence of the limits imposed by the constant references to the declared policy, it cannot be construed, in view of such references, as an unrestrained power to regulate the production and marketing of agricultural commodities for all purposes.

<sup>40</sup> Section 8 (c) (4), Appendix A.

<sup>41</sup> Section 8 (c) (16), Appendix A.

<sup>42</sup> Section 8 (c) (11) (A), Appendix A.

<sup>43</sup> Sections 8 (c) (5) and 8 (c) (7), Appendix A.

It is significant also that the Secretary's power to issue orders and marketing agreements is limited by the denial of power to take any action, the purpose of which would be to raise prices paid to farmers above the level specified in the Act. The Secretary has no power whatever under the Marketing Agreement Act with respect to any commodity the price of which exceeds that level. Under the decision of the court below, there would be no restraint whatever upon impediments to interstate commerce in that commodity. Obviously, Congress did not intend that result. Moreover, no statute which leaves such a clear gap in the regulation imposed can be held so completely to usurp the field of regulation as to repeal, by implication, a previous statute which provided for regulation applicable in such a case.

We submit that the device of marketing agreements and orders provided for in the Marketing Agreement Act is not a complete scheme for regulation of interstate commerce in agricultural products, but a regulation clearly adapted and definitely confined to but one purpose, the gradual establishment of parity prices to farmers. The granting to the Secretary of such authority as is necessary for that purpose has no effect upon the application of the Sherman Act to private restraints of commerce in agricultural products which are unrelated to that purpose. Plainly the Marketing Agreement Act does not exert the whole

power of Congress to regulate commerce in agricultural products.

We are not left by this Act to draw general conclusions based upon implications as to the philosophy behind the legislation. The purposes of the Act, the scheme of regulation which it embodies, and the narrow exemptions from the operation of the Sherman Act which it provides all make it clear that Congress intended the antitrust laws to remain fully effective except to the extent that specific exemption was provided in the terms of the Marketing Agreement Act itself.

The comments of the Secretary of Agriculture in an address before the American Institute of Co-operation of the University of Chicago, August 7, 1939,<sup>44</sup> concisely summarize the view which we believe the statute itself expresses. They are quoted here in part as a pertinent commentary by the administrator of the Marketing Agreement Act upon the policy which that Act expresses.

The other thing I want to make clear is that, in spite of anything you may have read, the policies of the Department of Agriculture and the Department of Justice in trying to cope with the Chicago milk situation are in harmony with each other. Both are designed to protect the public interest.

The kind of practice which should not be

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<sup>44</sup> Official Press Release of U. S. Department of Agriculture, No. 238-40.

tolerated is that which results when groups lock themselves up in some back room and, with no representative of the public sitting in, make deals which ignore the public interest. What is perhaps not generally understood is that there is a sharp distinction between this kind of practice and the procedure involved in marketing agreement programs. Marketing agreement procedure includes a public hearing in which the issues are laid out in the open. It results in a program which is administered by Federal authority and which *must* recognize the interests of all groups.

The prosecutions which have been carried on by the Department of Justice were occasioned by acts alleged to have been committed in the past, and in the absence of the type of market stabilization which the marketing agreement programs provide. Even if a marketing agreement is placed in effect in the Chicago market, it can deal with only a part of the problem. The Marketing Agreement Act does give the Department of Agriculture authority to regulate milk prices paid by distributors to producers. But the Department of Agriculture has no authority whatever to regulate resale prices. Consequently, if monopolistic practices exist in the milk distribution industry, the only agency of government having any authority to act is the Department of Justice.

## III

**THE CAPPER-VOLSTEAD ACT DOES NOT EXEMPT AGRICULTURAL COOPERATIVE ASSOCIATIONS FROM THE SHERMAN ACT**

The judgment of the District Court (R. 114-118, par. 2) sustained the demurrers of the Pure Milk Association, its officers and agents, as to all counts of the indictment on the ground that agricultural marketing associations are exempt from prosecution under Section 1 of the Sherman Act (R. 115). The order and judgment of the District Court formally recites that this exemption of agricultural marketing associations derives from Section 6 of the Clayton Act, the Capper-Volstead Act, and the Agricultural Marketing Agreement Act. From the court's opinion, however, it is apparent that in reaching this conclusion reliance was placed primarily, if not exclusively, upon the provisions of the Capper-Volstead Act. For this reason we will discuss the Capper-Volstead Act separately in connection with the indictment of the Pure Milk Association.

The Pure Milk Association is an agricultural cooperative association possessing whatever privileges and exemptions the Capper-Volstead Act is intended to give. That act removed the restriction of Section 6 of the Clayton Act with respect to capital stock and profits of farm cooperatives and

allowed farmers to combine for mutual benefit in the same way that individual stockholders are permitted to act together in a modern, private, commercial corporation. So far as this privilege is concerned there is nothing to indicate any general exemption from the antitrust laws.

The view that Section 1 of the Capper-Volstead Act was enacted for the purpose of removing the restrictions with respect to capital stock and profit imposed by Section 6 of the Clayton Act is supported by the language of Mr. Justice Brandeis in his dissenting opinion in *Frost v. Corporation Commission*, 278 U. S. 515, 541-542:

\* \* \* The enactment of state laws for the incorporation of nonstock co-operatives and their extensive use in the co-operative marketing of commodities, are due largely to the fact that, prior to 1922, the Clayton Act, October 15, 1914, c. 323, § 6 (38 Stat. 731), limited to nonstock co-operatives the right to make a class of agreements with members which prior thereto would have been void as in restraint of trade. \* \* \* Nearly one-half of the existing laws of the nonstock type were enacted between 1914 and 1922. This limitation in the Clayton Act proved to be unwise. By the Capper-Volstead Act of February 18, 1922, c. 57, § 1 (42 Stat. 388), Congress, recognizing the substantial identity of the two classes of co-operatives, extended the same right to stock co-operatives. \* \* \*

The right of collective bargaining on the part of farmers is protected and nothing in the Act even remotely suggests that the abuse of that privilege should be removed from the supervision of the Sherman Act.

The court itself admits that the Clayton Act did not exempt the activities of agricultural cooperatives from the scope of the antitrust laws (R. 105-106). Nevertheless, the court thought that the Capper-Volstead Act which broadened the legitimate activity of farm cooperatives went so far as to repeal the Sherman Act.

This conclusion appears to be based upon Section 2 of the Capper-Volstead Act which authorizes the Secretary to order a farm association which he finds "monopolizes or restrains trade in interstate or foreign commerce to such an extent that the price of any agricultural product is unduly enhanced by reason thereof" to cease and desist. The power to enter such an order in the opinion of the court took away from the Federal courts the right to prevent any unreasonable use of the privileges given to the farm cooperatives.

This conclusion the court reached through the process of viewing a "legislative trend" and not by virtue of any language whatever in the Act itself. Assuming *arguendo* a judicial power to rewrite statutes to make them conform to legislative trends, we will show that no such trend can be spelled out of the Capper-Volstead Act.

The power given to the Secretary to protect the public against unduly enhanced prices resulting from farm cooperatives is similar to an anti-profiteering law. It opens up a field going far beyond the purview of the Sherman Act, to wit, direct government intervention in price policy in cases where no other evidence of illegal combination exists. The Sherman Act itself has nothing directly to do with the reasonableness of prices. If a combination is not unreasonable in using its privileges to restrain trade, it is immaterial how high the prices go. On the other hand, a combination or conspiracy to fix prices cannot be justified on the ground that the prices are not unreasonably high. Labor, for example, has the right of collective bargaining. This right, however, is not a blanket exemption. *Loewe v. Lawlor*, 208 U. S. 274; *Duplex Co. v. Deering*, 254 U. S. 443; *Bedford Co. v. Stone Cutters' Assn.*, 274 U. S. 37, 49-50. However, assuming that a labor combination acts within its legitimate objectives, the Sherman Act does not inquire whether or not the wages obtained by collective bargaining are unduly enhanced.

Yet the court below reads into the grant to the Secretary of Agriculture of power to prevent collective bargaining from going too far, a license to restrain trade in any way and for any objective. Thus a positive limitation on the activity of farm cooperatives is construed into a blanket permission to violate the antitrust laws. We confess that we

are unable to see how this result can be reached by any logical process. It is like saying that the passage of an antiprofiteering law prohibiting corporations from charging unreasonable prices licenses them to form cartels. According to this reasoning the Lever Anti-Profiteering Act must have repealed the Sherman Act.

At the risk of laboring this point, let us examine the criteria which the Secretary is supposed to apply to determine what is an "unduly enhanced" price. Those standards are not set out in the Act, but a review of the economic ideas behind farm legislation since 1920 would seem to indicate that an unduly enhanced price for a farmer is related to the idea that farmers are entitled to parity prices and parity incomes. The framers of legislation for farmers have always thought in terms of the relation of farm income to income in other fields. For years agricultural statistics have been collected to show an unbalance of farm prices. Therefore, it was natural that use of the privilege of collective bargaining it should be restricted to the objective of obtaining parity income for farmers. At least there is no other standard which we can possibly suggest to guide the Secretary in determining unduly enhanced prices of farm products. This is not the ordinary idea of unreasonable profits. It concerns the relationship of farm prices to industrial prices. While such a standard

might be difficult to apply—indeed, there are no instances yet where it has been either defined or applied under the Capper-Volstead Act—at least the intention is along the lines of moderation and limitation, and the exercise of the farmers' right to buy competitively. The court below construes this limitation as a privilege on the part of a small group of farmers to combine with a small group of distributors in such a way as to prevent all the other farmers from gaining access to the market, provided nation-wide parity prices of milk are not disturbed.

Some doubt was expressed during the debates in Congress as to the constitutionality of determining "unduly enhanced prices."<sup>44</sup> We do not suggest that this provision of the statute is unconstitutional, but only emphasize that this expressed doubt makes it even clearer that Congress did not intend to substitute this newly granted and very doubtful power for the existing and recognized machinery of the Sherman Act.

The indictment below does not rest the charge against the Pure Milk Association upon its own conduct alone in the normal pursuit of its business, nor upon the combined action of its farmer-members "among themselves." The Pure Milk Association and its officers and agents were *not* indicted for combining among themselves to monopolize and restrain interstate trade and commerce by unduly

<sup>44</sup> See for example 62 Cong. Rec., pages 2168-2170, 2221.

enhancing prices. They were indicted for combining and conspiring *in conjunction with others not mentioned in the Capper-Volstead Act* to restrain interstate trade and commerce in fluid milk by fixing, maintaining, and controlling the prices to be paid its producers (Count One); by fixing and maintaining prices at which fluid milk is sold in Chicago (Count Two); by determining and controlling the distribution of fluid milk in Chicago (Count Three); and by controlling the supply of fluid milk permitted to be brought into the City of Chicago (Count Four). The illegality, therefore, consists in combining and conspiring with others outside of its organization and in restraining trade by means other than by unduly enhancing prices.

It is submitted that the powers conferred upon the Secretary of Agriculture under Section 2 of the Capper-Volstead Act do not in any respect limit or confine the criminal jurisdiction of the District Court to prosecute violations of the Sherman Act.<sup>48</sup> There is no necessary repugnance between the existence of the special administrative powers of civil enforcement conferred upon the Secretary

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<sup>48</sup> These conclusions are supported by Nourse, *The Legal Status of Agricultural Co-operation* (1927) at page 260.

Some co-operatives have apparently supposed that the passage of the Capper-Volstead Act removed them from the initial jurisdiction of the Department of Justice or from any regulatory action on the part of the Federal Trade Commission. Such a view, however, is not justified. The Department of Jus-

of Agriculture and criminal jurisdiction. It is now well settled that one who becomes a party to a combination and conspiracy in restraint of trade and commerce may be subject to prosecution under the Sherman Act at the instance of the Government without regard to the peculiar power of control and regulation which is vested in some administrative agency by another statute. Although the Interstate Commerce Act embodies a remedial system that is complete and self-contained, the Sherman Act has been held to apply to companies subject to the jurisdiction of the Interstate Commerce Commission, on the theory that the Sherman Act and the Interstate Commerce Act are wholly independent of each other. *United States v. Pacific and Arctic Ry. Co.*, 228 U. S. 87; *United States v. Union Pacific R. R. Co.*, 226 U. S. 61; *United States v. Joint Traffic Association*, 171 U. S. 505; *United States v. Trans-Missouri Freight Association*, 166 U. S. 290.

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tice is still entrusted with the enforcement of the Sherman and Clayton Acts, and the Federal Trade Commission retains the special powers conferred upon it by the Federal Trade Commission Act applying to business enterprises under the co-operative form as well as partnerships and ordinary corporations. In addition, special powers of original jurisdiction have now been conferred upon the Department of Agriculture as a third regulatory agency, but without removing co-operative associations from the authority of the Department of Justice and the Federal Trade Commission \* \* \*. [Italics supplied.]

The legislative history of the Capper-Volstead Act shows that Congress did not intend to exclude farm organizations from the scope of the antitrust laws when they used their privilege of collective bargaining to attain an end not in accord with the purpose for which the privilege was granted. The Act was enacted substantially in the form introduced in the House of Representatives by Mr. Volstead as H. R. 2373.<sup>47</sup> On April 26, 1921, this bill was reported to the House of Representatives from the Committee on the Judiciary by Mr. Volstead, with recommendation that it pass with a minor amendment not pertinent to this discussion. House Report No. 24, pages 1-3, 67th Cong., 1st sess., 61 Cong. Rec., Part I, page 687. This Report stated in part as follows:

\* \* \* \* \*

The object of this bill is to authorize the producers of agricultural products to form associations for the purpose of collectively preparing for market and marketing their products.

In the event that associations authorized by this bill shall do anything forbidden by the Sherman Antitrust Act, they will be subject to the penalties imposed by that law. It is not sought to place these associations above the law but to grant them the same immunity from prosecution that corpora-

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<sup>47</sup> 67th Cong., 1st sess., 61 Cong. Rec., Part I, page 98.

tions now enjoy so that they may be able to do business successfully in competition with them.

When the bill was first called up in the House of Representatives by Mr. Volstead, he stated further in explanation of its objectives: <sup>\*\*</sup>

It aims to authorize cooperative associations among farmers for the purpose of marketing their products. \* \* \*

The objection made to these organizations at present is that they violate the Sherman Antitrust Act, and that is upon the theory that each farmer is a separate business entity. When he combines with his neighbor for the purpose of securing better treatment in the disposal of his crops, he is charged with a conspiracy or combination contrary to the Sherman Antitrust Act. *Businessmen can combine by putting their money into corporations, but it is impractical for farmers to combine their farms into similar corporate form. The object of this bill is to modify the laws under which business organizations are now formed, so that farmers may take advantage of the form of organization that is used by business concerns.* It is objected in some quarters that this repeals the Sherman Antitrust Act as to farmers. That is not true any more than it is true that a combination of two or three corporations violates the act. Such combi-

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<sup>\*\*</sup> 61 Cong. Rec., Part I, page 1033.

nations may or may not monopolize or restrain trade. Corporations today have all sorts of subsidiary companies that operate together, and no one claims they violate this act.

Mr. SABATH. In what way does this bill differ from the Clayton Act? The Clayton Act in a sense permits the farmers to organize.

Mr. VOLSTEAD. The Clayton Act does not permit them to have any stock or operate for any profit. This bill makes it possible for them to have a small amount of stock and to operate to some extent for profit, but the profit must not exceed 8 percent on their capital. [Italics supplied.]

The Senate Committee to which the bill was referred reported through Mr. Walsh a substitute bill which eliminated Section 2 in its present form, and substituted a provision to the effect that Section 1 should not be deemed "to authorized the creation of or attempt to create a monopoly," or to exempt any association from the provisions of the Federal Trade Commission Act on account of unfair methods of competition. Senate Report 236, 67th Cong., 1st sess. This amendment was rejected by the Senate, which instead passed the bill substantially in the form of H. R. 2373. The extensive debate in the Senate on the bill concerned itself principally with the difference between the provisions of Section 2

of the House Bill and of the Senate substitute. It is noteworthy that in the entire Senate debate, and particularly in the arguments of Mr. Walsh in favor of his substitute and in the replies of proponents of the House bill, consideration was confined to the possibility that such associations in and of themselves, by virtue of their size and the scope of their own activities, might completely dominate the market in certain products.<sup>62</sup> The problem, therefore, to which Section 2 of the House Bill as finally enacted and the Walsh substitute commonly addressed themselves, was the devising of some means of restraint over the possible complete control and dominance of the market which such an association might acquire in a certain product. In no respect does it appear from the debates that Section 2 of the Act, as enacted, or as in the rejected Walsh substitute, was considered with relation to violations of the Sherman Act in the nature of combinations or conspiracies entered into with third persons, causing unreasonable restraints of trade of the character that would offend the Sherman Act if participated in by any ordinary business corporation.

#### CONCLUSION

For the reasons stated above, this Court has jurisdiction of this appeal. The judgment of the court

<sup>62</sup> See 62 Cong. <sup>2</sup> Rec., pages 2048-2054, 2057-2061, 2107-2123, 2156-2174, 2216-2230, 2256-2282.

below sustaining the demurrers to Counts One, Two,  
and Four of the indictment should be reversed.

Respectfully submitted.

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*Solicitor General.*

THURMAN ARNOLD,

*Assistant Attorney General.*

HUGH B. COX,

LEO F. TIERNEY,

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✓MAURICE L. A. GELLIS,

*Special Assistants to the Attorney General.*

NOVEMBER 1939.

*Appendix A*

UNITED STATES DEPARTMENT OF AGRICULTURE  
AGRICULTURAL ADJUSTMENT ADMINISTRATION

Division of Marketing and Marketing Agreements

ANNOTATED COMPILATION  
OF  
AGRICULTURAL MARKETING  
AGREEMENT ACT OF 1937

REENACTING, AMENDING, AND  
SUPPLEMENTING THE AGRICULTURAL  
ADJUSTMENT ACT, AS AMENDED



UNITED STATES  
GOVERNMENT PRINTING OFFICE  
WASHINGTON: 1937

#### PREFATORY NOTE

This compilation is intended to indicate the present status of legislation by Congress relating to marketing agreements and orders regulating the handling of agricultural commodities in interstate and foreign commerce. The Agricultural Marketing Agreement Act of 1937, approved June 3, 1937 (Public, No. 137—75th Congress—Chap. 296, 1st Session), reenacted and amended certain provisions of the Agricultural Adjustment Act, as amended, relating to marketing agreements and orders. Related legislation enacted prior to June 3, 1937, is given in the compilation known as "Annotated Compilation of the Agricultural Adjustment Act, as Amended, and Acts Relating Thereto at the Close of the First Session of the Seventy-Fourth Congress, August 26, 1935"; Superintendent of Documents, Washington, D. C.

Throughout the text of this compilation, bold face type is used for the language of the Agricultural Marketing Agreement Act of 1937; light face type is used for the language of the Agricultural Adjustment Act, as amended, as reenacted by the Agricultural Marketing Agreement Act of 1937; italics are used for amendments made by section 2 of the Agricultural Marketing Agreement Act of 1937 to the Agricultural Adjustment Act, as amended.

The provisions of section 2 of the Agricultural Marketing Agreement Act of 1937 are not set out haec verba. They are, however, incorporated in the body of the provisions of the Agricultural Adjustment Act, as amended, which they amend. References to the amendatory provisions of section 2 of the Agricultural Marketing Agreement Act of 1937 are contained in the annotations.

# ANNOTATED COMPILATION OF AGRICULTURAL MARKETING AGREEMENT ACT OF 1937 REENACTING, AMENDING AND SUPPLEMENTING THE AGRICULTURAL ADJUSTMENT ACT, AS AMENDED<sup>1</sup>

## AN ACT

To reenact and amend provisions of the Agricultural Adjustment Act, as amended, relating to marketing agreements and orders.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, that the following provisions of the Agricultural Adjustment Act, as amended, not having been intended for the control of the production of agricultural commodities, and having been intended to be effective irrespective of the validity of any other provision of that act are expressly affirmed and validated, and are reenacted without change except as provided in section 2:

### (a) Section 1 (relating to the declaration of emergency);

#### DECLARATION

*It is hereby declared that the disruption of the orderly exchange of commodities in interstate commerce impairs the purchasing power of farmers and destroys the value of agricultural assets which support the national credit structure and that these conditions affect transactions in agricultural commodities with a national public interest, and burden and obstruct the normal channels of interstate commerce.<sup>2</sup>*

### (b) Section 2 (relating to declaration of policy);

#### DECLARATION OF POLICY

SEC. 2. It is hereby declared to be the policy of Congress—

(1) Through the exercise of the powers conferred upon the Secretary of Agriculture under this title, to establish and maintain such *orderly marketing conditions for agricultural commodities in interstate commerce as will establish<sup>3</sup> prices to farmers at a level that will give agricultural commodities a purchasing power with respect*

<sup>1</sup> For annotations to the Agricultural Adjustment Act, as amended: for provisions of that act not reenacted by the provisions of the Agricultural Marketing Agreement Act of 1937; and for other acts of Congress relating both to the Agricultural Adjustment Act, as amended, and to the Agricultural Marketing Agreement Act of 1937 see "Annotated Compilation of Agricultural Adjustment Act as Amended and Acts Relating Thereto at the Close of the First Session of the 74th Congress, August 26, 1935"; Superintendent of Documents, Washington, D. C.

<sup>2</sup> As amended by sec. 2 (a) of the Agricultural Marketing Agreement Act of 1937. The text of sec. 1 of the Agricultural Adjustment Act, as amended, was as follows:

#### "DECLARATION OF EMERGENCY"

That the present acute economic emergency being in part the consequence of a severe and increasing disparity between the prices of agricultural and other commodities, which disparity has largely destroyed the purchasing power of farmers for industrial products, has broken down the orderly exchange of commodities, and has seriously impaired the agricultural assets supporting the national credit structure, it is hereby declared that these conditions in the basic industry of agriculture have affected transactions in agricultural commodities with a national public interest, have burdened and obstructed the normal currents of commerce in such commodities, and render imperative the immediate enactment of title 2 of this Act."

<sup>3</sup> The italicized words were substituted, by sec. 2 (b) of the Agricultural Marketing Agreement Act of 1937, in lieu of the words: "balance between the production and consumption of agricultural commodities, and such marketing conditions therefor, as will reestablish".

to articles that farmers buy, equivalent to the purchasing power of agricultural commodities in the base period, and, in the case of all commodities for which the base period is the pre-war period, August 1909 to July 1914, will also reflect current interest payments per acre on farm indebtedness secured by real estate and tax payments per acre on farm real estate, as contrasted with such interest payments and tax payments during the base period. The base period in the case of all agricultural commodities except tobacco and potatoes shall be the pre-war period, August 1909-July 1914. In the case of tobacco and potatoes, the base period shall be the postwar period, August 1919-July 1929.

(2) To protect the interest of the consumer by (a) approaching the level of prices which it is declared to be the policy of Congress to establish in subsection (1) of this section by gradual correction of the current level at as rapid a rate as the Secretary of Agriculture deems to be in the public interest and feasible in view of the current consumptive demand in domestic and foreign markets, and (b) authorizing no action under this title which has for its purpose the maintenance of prices to farmers above the level which it is declared to be the policy of Congress to establish in subsection (1) of this section.

**(c) Section 8a (5), (6), (7), (8), and (9) relating to violations and enforcement;**

SEC. 8a(5) Any person willfully exceeding any quota or allotment fixed for him under this title by the Secretary of Agriculture, and any other person knowingly participating, or aiding, in the exceeding of said quota or allotment, shall forfeit to the United States a sum equal to three times the current market value of such excess, which forfeiture shall be recoverable in a civil suit brought in the name of the United States.

(6) The several district courts of the United States are hereby vested with jurisdiction specifically to enforce, and to prevent and restrain any person from violating any order, regulation, or agreement, heretofore or hereafter made or issued pursuant to this title, in any proceeding now pending or hereafter brought in said courts.

(7) Upon the request of the Secretary of Agriculture, it shall be the duty of the several district attorneys of the United States, in their respective districts, under the directions of the Attorney General, to institute proceedings to enforce the remedies and to collect the forfeitures provided for in, or pursuant to, this title. Whenever the Secretary, or such officer or employee of the Department of Agriculture as he may designate for the purpose, has reason to believe that any handler has violated, or is violating, the provisions of any order or amendment thereto issued pursuant to this title, the Secretary shall have power to institute an investigation and, after due notice to such handler, to conduct a hearing in order to determine the facts for the purpose of referring the matter to the Attorney General for appropriate action.

(8) The remedies provided for in this section shall be in addition to, and not exclusive of, any of the remedies or penalties provided for elsewhere in this title or now or hereafter existing at law or in equity.

\* The following was deleted by section 2 (c) of the Agricultural Marketing Agreement Act of 1937: "the provisions of this section, or of".

(9) The term "person" as used in this title includes an individual, partnership, corporation, association, and any other business unit.

**(d) Section 8b (relating to marketing agreements);**

SEC. 8b. In order to effectuate the declared policy of this title, the Secretary of Agriculture shall have the power, after due notice and opportunity for hearing, to enter into marketing agreements with processors, producers, associations of producers, and others engaged in the handling of any agricultural commodity or product thereof, only with respect to such handling as is in the current of interstate or foreign commerce or which directly burdens, obstructs, or affects, interstate or foreign commerce in such commodity or product thereof. The making of any such agreement shall not be held to be in violation of any of the antitrust laws of the United States, and any such agreement shall be deemed to be lawful: Provided, That no such agreement shall remain in force after the termination of this Act. For the purpose of carrying out any such agreement the parties thereto shall be eligible for loans from the Reconstruction Finance Corporation under section 5 of the Reconstruction Finance Corporation Act. Such loans shall not be in excess of such amounts as may be authorized by the agreements.

**(e) Section 8c (relating to orders);**

**ORDERS**

SEC. 8c. (1) The Secretary of Agriculture shall, subject to the provisions of this section, issue, and from time to time amend, orders applicable to processors, associations of producers, and others engaged in the handling of any agricultural commodity or product thereof specified in subsection (2) of this section. Such persons are referred to in this title as "handlers." Such orders shall regulate, in the manner hereinafter in this section provided, only such handling of such agricultural commodity, or product thereof, as is in the current of interstate or foreign commerce, or which directly burdens, obstructs, or affects, interstate or foreign commerce in such commodity or product thereof.

**COMMODITIES TO WHICH APPLICABLE**

(2) Orders issued pursuant to this section shall be applicable only to the following agricultural commodities and the products thereof (except products of naval stores), or to any regional, or market classification of any such commodity or product: Milk, fruits (including pecans and walnuts but not including apples and not including fruits, other than olives, for canning), tobacco, vegetables (not including vegetables, other than asparagus, for canning) soybeans and naval stores as included in the Naval Stores Act and standards established thereunder (including refined or partially refined oleoresin).

**NOTICE AND HEARING**

(3) Whenever the Secretary of Agriculture has reason to believe that the issuance of an order will tend to effectuate the declared policy of this title with respect to any commodity or product thereof specified in subsection (2) of this section, he shall give due notice of and an opportunity for a hearing upon a proposed order.

FINDING AND ISSUANCE OF ORDER

(4) After such notice and opportunity for hearing, the Secretary of Agriculture shall issue an order if he finds, and sets forth in such order, upon the evidence introduced at such hearing (in addition to such other findings as may be specifically required by this section) that the issuance of such order and all of the terms and conditions thereof will tend to effectuate the declared policy of this title with respect to such commodity.

**TERMS—MILK AND ITS PRODUCTS**

(5) In the case of milk and its products, orders issued pursuant to this section shall contain one or more of the following terms and conditions; and (except as provided in subsection (7)) no others:

(A) Classifying milk in accordance with the form in which or the purpose for which it is used, and fixing, or providing a method for fixing, minimum prices for each such use classification which all handlers shall pay, and the time when payments shall be made, for milk purchased from producers or associations of producers. Such prices shall be uniform as to all handlers, subject only to adjustments for (1) volume, market, and production differentials customarily applied by the handlers subject to such order, (2) the grade or quality of the milk purchased, and (3) the locations at which delivery of such milk, or any use classification thereof, is made to such handlers.

## (B) Providing:

(i) for the payment to all producers and associations of producers delivering milk to the same handler of uniform prices for all milk delivered by them: Provided, That, except in the case of orders covering milk products only, such provision is approved or favored by at least three-fourths of the producers who, during a representative period determined by the Secretary of Agriculture, have been engaged in the production for market of milk covered in such order or by producers who, during such representative period, have produced at least three-fourths of the volume of such milk produced for market during such period; the approval required hereunder shall be separate and apart from any other approval or disapproval provided for by this section: or

(ii) for the payment to all producers and associations of producers delivering milk to all handlers of uniform prices for all milk so delivered, irrespective of the uses made of such milk by the individual handler to whom it is delivered;

subject, in either case, only to adjustments for (a) volume, market and production differentials customarily applied by the handlers subject to such order, (b) the grade or quality of the milk delivered, (c) the locations at which delivery of such milk is made, and (d) a further adjustment, equitably to apportion the total value of the milk purchased by any handler, or by all handlers, among producers and associations of producers, on the basis of their *marketings*<sup>8</sup> of milk during a representative period of time.

<sup>8</sup> The word "production" was deleted and the word "marketings" was substituted by section 2 (d) of the Agricultural Marketing Agreement Act of 1937.

(C) In order to accomplish the purposes set forth in paragraphs (A) and (B) of this subsection (5), providing a method for making adjustments in payments, as among handlers (including producers who are also handlers), to the end that the total sums paid by each handler shall equal the value of the milk purchased by him at the prices fixed in accordance with paragraph (A) hereof.

(D) Providing that, in the case of all milk purchased by handlers from any producer who did not regularly sell milk during a period of 30 days next preceding the effective date of such order for consumption in the area covered thereby, payments to such producer, for the period beginning with the first regular delivery by such producer and continuing until the end of two full calendar months following the first day of the next succeeding calendar month, shall be made at the price for the lowest use classification specified in such order, subject to the adjustments specified in paragraph (B) of this subsection (5).

(E) Providing (i) except as to producers for whom such services are being rendered by a cooperative marketing association, qualified as provided in paragraph (F) of this subsection (5), for market information to producers and for the verification of weights, sampling, and testing of milk purchased from producers, and for making appropriate deductions therefore from payments to producers, and (ii) for assurance of, and security for, the payment by handlers for milk purchased.

(F) Nothing contained in this subsection (5) is intended or shall be construed to prevent a cooperative marketing association qualified under the provisions of the Act of Congress of February 18, 1922, as amended, known as the "Capper-Volstead Act", engaged in making collective sales or marketing of milk or its products for the producers thereof, from blending the net proceeds of all its sales in all markets in all use classifications, and making distribution thereof to its producers in accordance with the contract between the association and its producers: *Provided*, That it shall not sell milk or its products to any handler for use or consumption in any market at prices less than the prices fixed pursuant to paragraph (A) of this subsection (5) for such milk.

(G) No marketing agreement or order applicable to milk and its products in any marketing area shall prohibit or in any manner limit, in the case of the products of milk, the marketing in that area of any milk or product thereof produced in any production area in the United States.

#### TERMS—OTHER COMMODITIES

(6) In the case of fruits (including pecans and walnuts but not including apples and not including fruits, other than olives, for canning) and their products, tobacco and its products, vegetables (not including vegetables, other than asparagus, for canning) and their products, soybeans and their products, and naval stores as included in the Naval Stores Act and standards established thereunder (including refined or partially refined oleoresin), orders issued pursuant to this section shall contain one or more of the following terms and conditions, and (except as provided in subsection (7)) no others:

(A) Limiting, or providing methods for the limitation of, the total quantity of any such commodity or product, or of any grade, size,

or quality thereof, produced during any specified period or periods, which may be marketed in or transported to any or all markets in the current of interstate or foreign commerce or so as directly to burden, obstruct, or affect interstate or foreign commerce in such commodity or product thereof, during any specified period or periods by all handlers thereof.

(B) Allotting, or providing methods for allotting, the amount of such commodity or product, or any grade, size, or quality thereof, which each handler may purchase from or handle on behalf of any and all producers thereof, during any specified period or periods under a uniform rule based upon the amounts \* sold by such producers in such prior period as the Secretary determines to be representative, or upon the current *quantities available for sale by* such producers, or both, to the end that the total quantity thereof to be purchased or handled during any specified period or periods shall be apportioned equitably among producers.

(C) Allotting, or providing methods for allotting, the amount of any such commodity or product, or any grade, size, or quality thereof, which each handler may market in or transport to any or all markets in the current of interstate or foreign commerce or so as directly to burden, obstruct, or affect interstate or foreign commerce in such commodity or product thereof, under a uniform rule based upon the amounts which each such handler has available for current shipment, or upon the amounts shipped by each such handler in such prior period as the Secretary determines to be representative, or both, to the end that the total quantity of such commodity or product, or any grade, size, or quality thereof, to be marketed in or transported to any or all markets in the current of interstate or foreign commerce or so as directly to burden, obstruct, or affect interstate or foreign commerce in such commodity or product thereof, during any specified period or periods shall be equitably apportioned among all of the handlers thereof.

(D) Determining, or providing methods for determining, the existence and extent of the surplus of any such commodity or product, or of any grade, size, or quality thereof, and providing for the control and disposition of such surplus, and for equalizing the burden of such surplus elimination or control among the producers and handlers thereof.

(E) Establishing, or providing for the establishment of, reserve pools of any such commodity or product, or of any grade, size, or quality thereof, and providing for the equitable distribution of the net return derived from the sale thereof among the persons beneficially interested therein.

#### TERMS COMMON TO ALL ORDERS

(7) In the case of the agricultural commodities and the products thereof specified in subsection (2) orders shall contain one or more of the following terms and conditions:

(A) Prohibiting unfair methods of competition and unfair trade practices in the handling thereof.

\* The words "produced or" were deleted by section 2 (e) of the Agricultural Marketing Agreement Act of 1937.

<sup>1</sup> The italicized words were substituted, by section 2 (e) of the Agricultural Marketing Agreement Act of 1937, in lieu of the words: "production or sales of".

(B) Providing that (except for milk and cream to be sold for consumption in fluid form) such commodity or product thereof, or any grade, size, or quality thereof shall be sold by the handlers thereof only at prices fixed by such handlers in the manner provided in such order.

(C) providing for the selection by the Secretary of Agriculture, or a method for the selection, of an agency or agencies and defining their powers and duties, which shall include only the powers:

- (i) To administer such order in accordance with its terms and provisions;
- (ii) To make rules and regulations to effectuate the terms and provisions of such order;
- (iii) To receive, investigate, and report to the Secretary of Agriculture complaints of violations of such order; and
- (iv) To recommend to the Secretary of Agriculture amendments to such order.

No person acting as a member of an agency established pursuant to this paragraph (C) shall be deemed to be acting in an official capacity, within the meaning of section 10 (g) of this title, unless such person receives compensation for his personal services from funds of the United States.

(D) Incidental to, and not inconsistent with, the terms and conditions specified in subsections (5), (6), and (7) and necessary to effectuate the other provisions of such order.

#### ORDERS WITH MARKETING AGREEMENT

(8) Except as provided in subsection (9) of this section, no order issued pursuant to this section shall become effective until the handlers (excluding cooperative associations of producers who are not engaged in processing, distributing, or shipping the commodity or product thereof covered by such order) of not less than 50 per centum of the volume of the commodity or product thereof covered by such order which is produced or marketed within the production or marketing area defined in such order have signed a marketing agreement, entered into pursuant to section 8b of this title, which regulates the handling of such commodity or product in the same manner as such order, except that as to citrus fruits produced in any area producing what is known as California citrus fruits no order issued pursuant to this subsection (8) shall become effective until the handlers of not less than 80 per centum of the volume of such commodity or product thereof covered by such order have signed such a marketing agreement: Provided, That no order issued pursuant to this subsection shall be effective unless the Secretary of Agriculture determines that the issuance of such order is approved or favored:

(A) By at least two-thirds of the producers who (except that as to citrus fruits produced in any area producing what is known as California citrus fruits said order must be approved or favored by three-fourths of the producers), during a representative period determined by the Secretary, have been engaged, within the production area specified in such marketing agreement or order, in the production for market of the commodity specified therein, or who, during such representative period, have been engaged in the production of

such commodity for sale in the marketing area specified in such marketing agreement, or order, or

(B) By producers who, during such representative period, have produced for market at least two-thirds of the volume of such commodity produced for market within the production area specified in such marketing agreement or order, or who, during such representative period, have produced at least two-thirds of the volume of such commodity sold within the marketing area specified in such marketing agreement or order.

#### ORDERS WITH OR WITHOUT MARKETING AGREEMENT

(9) Any order issued pursuant to this section shall become effective in the event that, notwithstanding the refusal or failure of handlers (excluding cooperative associations of producers who are not engaged in processing, distributing, or shipping the commodity or product thereof covered by such order) of more than 50 per centum of the volume of the commodity or product thereof (except that as to citrus fruits produced in any area producing what is known as California citrus fruits said per centum shall be 80 per centum), covered by such order which is produced or marketed within the production or marketing area defined in such order to sign a marketing agreement relating to such commodity or product thereof, on which a hearing has been held, the Secretary of Agriculture, with the approval of the President, determines:

(A) That the refusal or failure to sign a marketing agreement (upon which a hearing has been held) by the handlers (excluding cooperative associations of producers who are not engaged in processing, distributing, or shipping the commodity or product thereof covered by such order) of more than 50 per centum of the volume of the commodity or product thereof (except that as to citrus fruits produced in any area producing what is known as California citrus fruits said per centum shall be 80 per centum) specified therein which is produced or marketed within the production or marketing area specified therein tends to prevent the effectuation of the declared policy of this title with respect to such commodity or product, and

(B) That the issuance of such order is the only practical means of advancing the interests of the producers of such commodity pursuant to the declared policy, and is approved or favored:

(i) By at least two-thirds of the producers (except that as to citrus fruits produced in any area producing what is known as California citrus fruits said order must be approved or favored by three-fourths of the producers) who, during a representative period determined by the Secretary, have been engaged, within the production area specified in such marketing agreement or order, in the production for market of the commodity specified therein, or who, during such representative period, have been engaged in the production of such commodity for sale in the marketing area specified in such marketing agreement, or order, or

(ii) By producers who, during such representative period, have produced for market at least two-thirds of the volume of such commodity produced for market within the production area specified in such marketing agreement or order, or who, during such representative period, have produced at least two-thirds of the volume of such

commodity sold within the marketing area specified in such marketing agreement or order.

#### MANNER OF REGULATION AND APPLICABILITY

(10) No order shall be issued under this section unless it regulates the handling of the commodity or product covered thereby in the same manner as, and is made applicable only to persons in the respective classes of industrial or commercial activity specified in, a marketing agreement upon which a hearing has been held. No order shall be issued under this title prohibiting, regulating, or restricting the advertising of any commodity or product covered thereby, nor shall any marketing agreement contain any provision prohibiting, regulating, or restricting the advertising of any commodity or product covered by such marketing agreement.

#### REGIONAL APPLICATION

(11) (A) No order shall be issued under this section which is applicable to all production areas or marketing areas, or both, of any commodity or product thereof unless the Secretary finds that the issuance of several orders applicable to the respective regional production areas or regional marketing areas, or both, as the case may be, of the commodity or product would not effectively carry out the declared policy of this title.

(B) Except in the case of milk and its products, orders issued under this section shall be limited in their application to the smallest regional production areas or regional marketing areas, or both, as the case may be, which the Secretary finds practicable, consistently with carrying out such declared policy.

(C) All orders issued under this section which are applicable to the same commodity or product thereof shall, so far as practicable, prescribe such different terms, applicable to different production areas and marketing areas, as the Secretary finds necessary to give due recognition to the differences in production and marketing of such commodity or product in such areas.

#### COOPERATIVE ASSOCIATION REPRESENTATION

(12) Whenever, pursuant to the provisions of this section, the Secretary is required to determine the approval or disapproval of producers with respect to the issuance of any order, or any term or condition thereof, or the termination thereof, the Secretary shall consider the approval or disapproval by any cooperative association of producers, bona fide engaged in marketing the commodity or product thereof covered by such order, or in rendering services for or advancing the interests of the producers of such commodity, as the approval or disapproval of the producers who are members of, stockholders in, or under contract with, such cooperative association of producers.

#### RETAILER AND PRODUCER EXEMPTION

(13) (A) No order issued under subsection (9) of this section shall be applicable to any person who sells agricultural commodities or products thereof at retail in his capacity as such retailer, except to a retailer in his capacity as a retailer of milk and its products.

(B) No order issued under this title shall be applicable to any producer in his capacity as a producer.

#### VIOLATION OF ORDER

(14). Any handler subject to an order issued under this section, or any officer, director, agent, or employee of such handler, who violates any provision of such order (other than a provision calling for payment of a pro rata share of expenses) shall, on conviction, be fined not less than \$50 or more than \$500 for each such violation, and each day during which such violation continues shall be deemed a separate violation: Provided, That if the court finds that a petition pursuant to subsection (15) of this section was filed and prosecuted by the defendant in good faith and not for delay, no penalty shall be imposed under this subsection for such violations as occurred between the date upon which the defendant's petition was filed with the Secretary, and the date upon which notice of the Secretary's ruling thereon was given to the defendant in accordance with regulations prescribed pursuant to subsection (15).

#### PETITION BY HANDLER AND REVIEW

(15) (A) Any handler subject to an order may file a written petition with the Secretary of Agriculture, stating that any such order or any provision of any such order or any obligation imposed in connection therewith is not in accordance with law and praying for a modification thereof or to be exempted therefrom. He shall thereupon be given an opportunity for a hearing upon such petition, in accordance with regulations made by the Secretary of Agriculture, with the approval of the President. After such hearing, the Secretary shall make a ruling upon the prayer of such petition which shall be final, if in accordance with law.

(B) The District Courts of the United States (including the Supreme Court of the District of Columbia) in any district in which such handler is an inhabitant, or has his principal place of business, are hereby vested with jurisdiction in equity to review such ruling, provided a bill in equity for that purpose is filed within twenty days from the date of the entry of such ruling. Service of process in such proceedings may be had upon the Secretary by delivering to him a copy of the bill of complaint. If the court determines that such ruling is not in accordance with law, it shall remand such proceedings to the Secretary with directions either (1) to make such ruling as the court shall determine to be in accordance with law, or (2) to take such further proceedings as, in its opinion, the law requires. The pendency of proceedings instituted pursuant to this subsection (15) shall not impede, hinder, or delay the United States or the Secretary of Agriculture from obtaining relief pursuant to section 8a (6) of this title. Any proceedings brought pursuant to section 8a (6) of this title (except where brought by way of counterclaim in proceedings instituted pursuant to this subsection (15) shall abate whenever a final decree has been rendered in proceedings between the same parties, and covering the same subject matter, instituted pursuant to this subsection (15).

## TERMINATION OF ORDERS AND MARKETING AGREEMENTS

(16) (A) The Secretary of Agriculture shall, whenever he finds that any order issued under this section, or any provision thereof, obstructs or does not tend to effectuate the declared policy of this title, terminate or suspend the operation of such order or such provision thereof.

(B) The Secretary shall terminate any marketing agreement entered into under section 8b, or order issued under this section, at the end of the then current marketing period for such commodity, specified in such marketing agreement or order, whenever he finds that such termination is favored by a majority of the producers who, during a representative period determined by the Secretary, have been engaged in the production for market of the commodity specified in such marketing agreement or order, within the production area specified in such marketing agreement or order, or who, during such representative period, have been engaged in the production of such commodity for sale within the marketing area specified in such marketing agreement or order: *Provided*, That such majority have, during such representative period, produced for market more than 50 per centum of the volume of such commodity produced for market within the production area specified in such marketing agreement or order, or have, during such representative period, produced more than 50 per centum of the volume of such commodity sold in the marketing area specified in such marketing agreement or order, but such termination shall be effective only if announced on or before such date (prior to the end of the then current marketing period) as may be specified in such marketing agreement or order.

(C) The termination or suspension of any order or amendment thereto or provision thereof, shall not be considered an order within the meaning of this section.

## PROVISIONS APPLICABLE TO AMENDMENTS

(17) The provisions of this section, section 8d, and section 8e applicable to orders shall be applicable to amendments to orders: *Provided*, That notice of a hearing upon a proposed amendment to any order issued pursuant to section 8c, given not less than three days prior to the date fixed for such hearing, shall be deemed due notice thereof.

## MILK PRICES

(18) The Secretary of Agriculture, prior to prescribing any term in any marketing agreement or order, or amendment thereto, relating to milk or its products, if such term is to fix minimum prices to be paid to producers or associations of producers, or prior to modifying the price fixed in any such term, shall ascertain, in accordance with section 2 and section 8e, the prices that will give such commodities a purchasing power equivalent to their purchasing power during the base period. The level of prices which it is declared to be the policy of Congress to establish in section 2 and section 8e shall, for the purposes of such agreement, order, or amendment, be such level as will reflect the price of feeds, the available supplies of feeds, and other economic conditions which affect market supply and demand, for milk or its products in the marketing area to which the contemplated mar-

*keting agreement, order, or amendment relates. Whenever the Secretary finds, upon the basis of the evidence adduced at the hearing required by section 8b or 8c, as the case may be, that the prices that will give such commodities a purchasing power equivalent to their purchasing power during the base period as determined pursuant to section 2 and section 8e are not reasonable in view of the price of feeds, the available supplies of feeds, and other economic conditions which affect market supply and demand for milk and its products in the marketing area to which the contemplated agreement, order, or amendment relates, he shall fix such prices as he finds will reflect such factors, insure a sufficient quantity of pure and wholesome milk, and be in the public interest. Thereafter, as the Secretary finds necessary on account of changed circumstances, he shall, after due notice and opportunity for hearing, make adjustments in such prices.*

#### PRODUCER REFERENDUM

*(19) For the purpose of ascertaining whether the issuance of an order is approved or favored by producers, as required under the applicable provisions of this title, the Secretary may conduct a referendum among producers. The requirements of approval or favor under any such provision shall be held to be complied with if, of the total number of producers, or the total volume of production, as the case may be, represented in such referendum, the percentage approving or favoring is equal to or in excess of the percentage required under such provision. Nothing in this subsection shall be construed as limiting representation by cooperative associations as provided in subsection (12).<sup>8</sup>*

#### (f) Section 8d (relating to books and records);

##### BOOKS AND RECORDS

**SEC. 8d.** (1) All parties to any marketing agreement, and all handlers subject to an order, shall severally, from time to time, upon the request of the Secretary, to furnish him with such information as he finds to be necessary to enable him to ascertain and determine the extent to which such agreement or order has been carried out or has effectuated the declared policy of this title, and with such information as he finds to be necessary to determine whether or not there has been any abuse of the privilege of exemptions from the anti-trust laws. Such information shall be furnished in accordance with forms of reports to be prescribed by the Secretary. For the purpose of ascertaining the correctness of any report made to the Secretary pursuant to this subsection, or for the purpose of obtaining the information required in any such report, where it has been requested and has not been furnished, the Secretary is hereby authorized to examine such books, papers, records, copies of income-tax reports, accounts, correspondence, contracts, documents, or memoranda, as he deems relevant and which are within the control (1) of any such party to such marketing agreement, or any such handler, from whom such report was requested or (2) of any person having, either directly or indirectly, actual or legal control of or over such party or

<sup>8</sup> This italicized subsection was added by sec. 2 (f) of the Agricultural Marketing Agreement Act of 1937.

<sup>9</sup> This italicized subsection was added by sec. 2 (f) of the Agricultural Marketing Agreement Act of 1937.

such handler or (3) of any subsidiary of any such party, handler, or person.

(2) Notwithstanding the provisions of section 7, all information furnished to or acquired by the Secretary of Agriculture pursuant to this section shall be kept confidential by all officers and employees of the Department of Agriculture and only such information so furnished or acquired as the Secretary deems relevant shall be disclosed by them, and then only in a suit or administrative hearing brought at the direction, or upon the request, of the Secretary of Agriculture, or to which he or any officer of the United States is a party, and involving the marketing agreement or order with reference to which the information so to be disclosed was furnished or acquired. Nothing in this section shall be deemed to prohibit (A) the issuance of general statements based upon the reports of a number of parties to a marketing agreement or of handlers subject to an order, which statements do not identify the information furnished by any person, or (B) the publication by direction of the Secretary, of the name of any person violating any marketing agreement or any order, together with a statement of the particular provisions of the marketing agreement or order violated by such person. Any such officer or employee violating the provisions of this section shall upon conviction be subject to a fine of not more than \$1,000 or to imprisonment for not more than one year, or to both, and shall be removed from office.

**(g) Section 8e (relating to determination of base period);**

**DETERMINATION OF BASE PERIOD**

Sec. 8e. In connection with the making of any marketing agreement or the issuance of any order, if the Secretary finds and proclaims that, as to any commodity specified in such marketing agreement or order, the purchasing power during the base period specified for such commodity in section 2 of this title cannot be satisfactorily determined from available statistics of the Department of Agriculture, the base period, for the purposes of such marketing agreement or order, shall be the post-war period, August 1919-July 1929, or all that portion thereof for which the Secretary finds and proclaims that the purchasing power of such commodity can be satisfactorily determined from available statistics of the Department of Agriculture.

**(h) Section 10 (a), (b) (2), (c), (f), (g), (h), and (i) (miscellaneous provisions);**

**MISCELLANEOUS**

Sec. 10. (a) The Secretary of Agriculture may appoint such officers and employees, subject to the provisions of the Classification Act of 1923 and Acts amendatory thereof, and such experts as are necessary to execute the functions vested in him by this title; and the Secretary may make such appointments without regard to the civil service laws or regulations: Provided, That no salary in excess of \$10,000 per annum shall be paid to any officer, employee, or expert of the Agricultural Adjustment Administration, which the Secretary shall establish in the Department of Agriculture for the administration of the functions vested in him by this title: And provided

further. That the State Administrator appointed to administer this Act in each State shall be appointed by the President, by and with the advice and consent of the Senate. Title II of the Act entitled "An Act to maintain the credit of the United States Government", approved March 20, 1933, to the extent that it provides for the impoundment of appropriations on account of reductions in compensation, shall not operate to require such impoundment under appropriations contained in this Act.

(b) "(2)<sup>10</sup> Each order issued by the Secretary under this title shall provide that each handler subject thereto shall pay to any authority or agency established under such order such handler's pro rata share (as approved by the Secretary) of such expenses as the Secretary may find will necessarily be incurred by such authority or agency, during any period specified by him, for the maintenance and functioning of such authority or agency, other than expenses incurred in receiving, handling, holding, or disposing of any quantity of a commodity received, handled, held, or disposed of by such authority or agency for the benefit or account of persons other than handlers subject to such order. The pro rata share of the expenses payable by a cooperative association<sup>11</sup> of producers shall be computed on the basis of the quantity of the agricultural commodity or product thereof covered by such order which is distributed, processed, or shipped by such cooperative association of producers. Any such authority or agency may maintain in its own name, or in the names of its members, a suit against any handler subject to an order for the collection of such handler's pro rata share of expenses. The several District Courts of the United States are hereby vested with jurisdiction to entertain such suits regardless of the amount in controversy.

(c) The Secretary of Agriculture is authorized, with the approval of the President, to make such regulations with the force and effect of law as may be necessary to carry out the powers vested in him by this title.<sup>12</sup> Any violation of any regulation shall be subject to such penalty, not in excess of \$100, as may be provided therein.

(f) The provisions of this title shall be applicable to the United States and its possessions, except the Philippine Islands, the Virgin Islands, American Samoa, the Canal Zone, and the island of Guam; except that, in the case of sugar beets and sugarcane, the President, if he finds it necessary in order to effectuate the declared policy of this Act, is authorized by proclamation to make the provisions of this title applicable to the Philippine Islands, the Virgin Islands; American Samoa, the Canal Zone, and/or the island of Guam.<sup>13</sup>

(g) No person shall, while acting in any official capacity in the administration of this title, speculate, directly or indirectly, in any agricultural commodity or product thereof, to which this title applies, or in contracts relating thereto, or in the stock or membership interests of any association or corporation engaged in handling,

<sup>10</sup> Sec. 10 (b) (2) of the Agricultural Adjustment Act, as amended.

<sup>11</sup> Sec. 2 (g) of the Agricultural Marketing Agreement Act of 1937 deletes the following: "including regulations establishing conversion factors for any commodity and article processed therefrom to determine the amount of tax imposed or refunds to be made with respect thereto".

<sup>12</sup> Sec. 2 (h) of the Agricultural Marketing Agreement Act of 1937 deletes the sentence: "The President is authorized to attach by Executive order any or all such possessions to any internal-revenue collection district for the purpose of carrying out the provisions of this title with respect to the collection of taxes".

processing, or disposing of any such commodity or product. Any person violating this subsection shall upon conviction thereof be fined not more than \$10,000 or imprisoned not more than two years, or both.

(h) For the efficient administration of the provisions of part 2 of this title, the provisions, including penalties, of sections 8, 9, and 10 of the Federal Trade Commission Act, approved September 26, 1914, are made applicable to the jurisdiction, powers, and duties of the Secretary in administering the provisions of this title and to any person subject to the provisions of this title, whether or not a corporation. Hearings authorized or required under this title shall be conducted by the Secretary of Agriculture or such officer or employee of the Department as he may designate for the purpose. The Secretary may report any violation of any agreement entered into under part 2 of this title to the Attorney General of the United States, who shall cause appropriate proceedings to enforce such agreement to be commenced and prosecuted in the proper courts of the United States without delay.

(i) The Secretary of Agriculture upon the request of the duly constituted authorities of any State is directed, in order to effectuate the declared policy of this title and in order to obtain uniformity in the formulation, administration, and enforcement of Federal and State programs relating to the regulation of the handling of agricultural commodities or products thereof, to confer with and hold joint hearings with the duly constituted authorities of any State, and is authorized to cooperate with such authorities; to accept and utilize, with the consent of the State, such State and local officers and employees as may be necessary; to avail himself of the records and facilities of such authorities; to issue orders (subject to the provisions of section 8c) complementary to orders or other regulations issued by such authorities; and to make available to such State authorities the records and facilities of the Department of Agriculture: Provided, That information furnished to the Secretary of Agriculture pursuant to section 8d (1) hereof shall be made available only to the extent that such information is relevant to transactions within the regulatory jurisdiction of such authorities, and then only upon a written agreement by such authorities that the information so furnished shall be kept confidential by them in a manner similar to that required of Federal officers and employees under the provisions of section 8d (2) hereof.

(j) The term "interstate or foreign commerce" means commerce between any State, Territory, or possession, or the District of Columbia, and any place outside thereof; or between points within the same State, Territory, or possession, or the District of Columbia, but through any place outside thereof; or within any Territory or possession, or the District of Columbia. For the purpose of this Act (but in nowise limiting the foregoing definition) a marketing transaction in respect to an agricultural commodity or the product thereof shall be considered in interstate or foreign commerce if such commodity or product is part of that current of interstate or foreign commerce usual in the handling of the commodity or product whereby they, or either of them, are sent from one State to end their transit, after purchase, in another, including all cases where purchase or sale is either for shipment to another State or for the processing within

*the State and the shipment outside the State of the products processed. Agricultural commodities or products thereof normal in such current of interstate or foreign commerce shall not be considered out of such current through resort being had to any means or device intended to remove transactions in respect thereto from the provisions of this Act. As used herein, the word "State" includes Territory, the District of Columbia, possession of the United States and foreign nations.<sup>13</sup>*

(i) Section 12 (a) and (c) (relating to appropriation and expense);

#### APPROPRIATION

SEC. 12. (a) There is hereby appropriated, out of any money in the Treasury, not otherwise appropriated, the sum of \$100,000,000 to be available to the Secretary of Agriculture for administrative expenses under this title and for payments authorized to be made under section 8. Such sum shall remain available until expended.

To enable the Secretary of Agriculture to finance, under such terms and conditions as he may prescribe, surplus reductions<sup>14</sup> with respect to the dairy- and beef-cattle industries, and to carry out any of the purposes described in subsections (a) and (b) of this section (12) and to support and balance the markets for the dairy and beef cattle industries, there is authorized to be appropriated, out of any money in the Treasury not otherwise appropriated, the sum of \$200,000,000: Provided, That not more than 60 per centum of such amount shall be used for either of such industries.

(c) The administrative expenses provided for under this section shall include, among others, expenditures for personal services and rent in the District of Columbia and elsewhere, for law books and books of reference, for contract stenographic reporting services, and for printing and paper in addition to allotments under the existing law. The Secretary of Agriculture shall transfer to the Treasury Department, and is authorized to transfer to other agencies, out of funds available for administrative expenses under this title, such sums as are required to pay administrative expenses incurred and refunds made by such department or agencies in the administration of this title.

(j) Section 14 (relating to separability);

#### SEPARABILITY OF PROVISIONS

SEC. 14. If any provision of this title is declared unconstitutional, or the applicability thereof to any person, circumstance, or commodity is held invalid, the validity of the remainder of this title and the applicability thereof to other persons, circumstances, or commodities shall not be affected thereby.

(k) Section 22 (relating to imports);

#### IMPORTS

SEC. 22. (a) Whenever the President has reason to believe that any one or more articles are being imported into the United States,

<sup>13</sup> This italicized subsection was added by sec. 2 (1) of the Agricultural Marketing Agreement Act of 1937.

<sup>14</sup> Sec. 2 (1) of the Agricultural Marketing Agreement Act of 1937 deletes the words "and production adjustments".

der such conditions and in sufficient quantities as to render or tend to render ineffective or materially interfere with any program or ration undertaken, or to reduce substantially the amount of any product processed in the United States from any commodity subject to and with respect to which any program is in operation, under this title or the Soil Conservation and Domestic Allotment Act, as amended, he shall cause an immediate investigation to be made by the United States Tariff Commission, which shall give precedence to investigations under this section to determine such facts. Such investigation shall be made after due notice and opportunity for hearing interested parties and shall be conducted subject to such regulations as the President shall specify.

b) If, on the basis of such investigation and report to him of findings and recommendations made in connection therewith, the President finds the existence of such facts, he shall by proclamation impose limitations on the total quantities of any article or articles which may be imported as he finds and declares shown by such investigation to be necessary to prescribe in order that the entry of such article or articles will not render or tend to render ineffective or materially interfere with any program or operation undertaken, or will not reduce substantially the amount of any product processed in the United States from any commodity subject to and with respect to which any program is in operation, under this title or the Soil Conservation and Domestic Allotment Act, as amended: provided, That no limitation shall be imposed on the total quantity of any article which may be imported from any country which reduces the permissible total quantity to less than 50 per centum of the average annual quantity of such article which was imported from such country during the period from July 1, 1928, to June 30, 1933, both dates inclusive.

(c) No import restriction proclaimed by the President under this section nor any revocation, suspension, or modification thereof shall become effective until fifteen days after the date of such proclamation, revocation, suspension, or modification.

(d) Any decision of the President as to facts under this section shall be final.

(e) After investigation, report, finding, and declaration in the manner provided in the case of a proclamation issued pursuant to subsection (b) of this section, any proclamation or provision of such proclamation may be suspended by the President whenever he finds that the circumstances requiring the proclamation or provision thereof no longer exists, or may be modified by the President whenever he finds that changed circumstances require such modification to carry out the purposes of this section.<sup>15</sup>

**Sec. 2. The following provisions, reenacted in section 1 of this act, are amended as follows:**<sup>16</sup>

**Sec. 3. (a) The Secretary of Agriculture, or such officer or employee of the Department of Agriculture as may be designated**

<sup>15</sup> Sec. 5 of Public Law No. 461, 74th Cong., approved February 29, 1936, amended sec. 22 of the Agricultural Adjustment Act, as amended, by inserting after the words "this title", wherever they appeared, the words "or the Soil Conservation and Domestic Allotment Act, as amended"; and by deleting the words "an adjustment", wherever they appeared, and inserting in lieu thereof the word "any".

<sup>16</sup> Subsections (a) to (j) inclusive, of section 2 of the Agricultural Marketing Agreement Act of 1937 are incorporated in the preceding text and in footnotes 2 to 9 inclusive and 11 to 14 inclusive, supra.

by him, upon written application of any cooperative association incorporated or otherwise, which is in good faith owned or controlled by producers or organizations thereof, of milk or its products, and which is bona fide engaged in collective processing or preparing for market or handling or marketing (in the current of interstate or foreign commerce, as defined by paragraph (i) of section 2 of this act), milk or its products, may mediate and, with the consent of all parties, shall arbitrate if the Secretary has reason to believe that the declared policy of the Agricultural Adjustment Act, as amended, would be effectuated thereby, bona fide disputes, between such associations and the purchasers or handlers or processors or distributors of milk or its products as to terms and conditions of the sale of milk or its products. The power to arbitrate under this section shall apply only to such subjects of the term or condition in dispute as could be regulated under the provisions of the Agricultural Adjustment Act, as amended, relating to orders for milk and its products.

(b) Meetings held pursuant to this section shall be conducted subject to such rules and regulations as the Secretary may prescribe.

(c) No award or agreement resulting from any such arbitration or mediation shall be effective unless and until approved by the Secretary of Agriculture, or such officer or employee of the Department of Agriculture as may be designated by him, and shall not be approved if it permits any unlawful trade practice or any unfair method of competition.

(d) No meeting so held and no award or agreement so approved shall be deemed to be in violation of any of the antitrust laws of the United States.

Sec. 4. Nothing in this act shall be construed as invalidating any marketing agreement, license, or order, or any regulation relating to, or any provision of, or any act of the Secretary of Agriculture in connection with, any such agreement, license, or order which has been executed, issued, approved, or done under the Agricultural Adjustment Act, or any amendment thereto, but such marketing agreements, licenses, orders, regulations, provisions, and acts are hereby expressly ratified, legalized, and confirmed.

Sec. 5. No processing taxes or compensating taxes shall be levied or collected under the Agricultural Adjustment Act, as amended. Except as provided in the preceding sentence, nothing in this act shall be construed as affecting provisions of the Agricultural Adjustment Act, as amended, other than those enumerated in section 1. The provisions so enumerated shall apply in accordance with their terms (as amended by this act) to the provisions of the Agricultural Adjustment Act, this act, and other provisions of law to which they have been heretofore made applicable.

Sec. 6. This act may be cited as the "Agricultural Marketing Agreement Act of 1937."

## APPENDIX B

Section 6 of the Clayton Act, c. 323, 38 Stat. 730, U. S. C., Title 15, Section 17, is as follows:

The labor of a human being is not a commodity or article of commerce. Nothing contained in the antitrust laws shall be construed to forbid the existence and operation of labor, agricultural, or horticultural organizations, instituted for the purposes of mutual help, and not having capital stock or conducted for profit, or to forbid or restrain individual members of such organizations from lawfully carrying out the legitimate objects thereof; nor shall such organizations, or the members thereof, be held or construed to be illegal combinations or conspiracies in restraint of trade, under the antitrust laws.

The Capper-Volstead Act, c. 57, 42 Stat. 388, U. S. C., Title 7, Sections 291, 292, is as follows:

SEC. 1. Persons engaged in the production of agricultural products as farmers, planters, ranchmen, dairymen, nut or fruit growers may act together in associations, corporate or otherwise, with or without capital stock, in collectively processing, preparing for market, handling, and marketing in interstate and foreign commerce, such products of persons so engaged. Such associations may have marketing agencies in common; and such associations and their members may make the necessary contracts

and agreements to effect such purposes: *Provided, however,* That such associations are operated for the mutual benefit of the members thereof, as such producers, and conform to one or both of the following requirements:

First. That no member of the association is allowed more than one vote because of the amount of stock or membership capital he may own therein, or,

Second. That the association does not pay dividends on stock or membership capital in excess of 8 per centum per annum.

And in any case to the following:

Third. That the association shall not deal in the products of nonmembers to an amount greater in value than such as are handled by it for members.

SEC. 2. If the Secretary of Agriculture shall have reason to believe that any such association monopolizes or restrains trade in interstate or foreign commerce to such an extent that the price of any agricultural product is unduly enhanced by reason thereof, he shall serve upon such association a complaint stating his charge in that respect, to which complaint shall be attached or contained therein, a notice of hearing, specifying a day and place not less than thirty days after the service thereof, requiring the association to show cause why an order should not be made directing it to cease and desist from monopolization or restraint of trade. An association so complained of may at the time and place so fixed show cause why such order should not be entered. The evidence given on such a hearing shall be taken under such rules and regulations as the Secretary of Agriculture may prescribe, reduced to writing, and made a

part of the record therein. If upon such hearing the Secretary of Agriculture shall be of the opinion that such association monopolizes or restrains trade in interstate or foreign commerce to such an extent that the price of any agricultural product is unduly enhanced thereby, he shall issue and cause to be served upon the association an order reciting the facts found by him, directing such association to cease and desist from monopolization or restraint of trade. On the request of such association, or if such association fails or neglects for thirty days to obey such order, the Secretary of Agriculture shall file in the district court in the judicial district in which such association has its principal place of business a certified copy of the order and of all the records in the proceeding, together with a petition asking that the order be enforced, and shall give notice to the Attorney General and to said association of such filing. Such district court shall thereupon have jurisdiction to enter a decree affirming, modifying, or setting aside said order, or enter such other decree as the court may deem equitable, and may make rules as to pleadings and proceedings to be had in considering such order. The place of trial may, for cause or by consent of parties, be changed as in other causes.

The facts found by the Secretary of Agriculture and recited or set forth in said order shall be prima facie evidence of such facts, but either party may adduce additional evidence. The Department of Justice shall have charge of the enforcement of such order. After the order is so filed in such district court and while pending for review therein the court may issue a temporary writ of injunction forbidding such associa-

tion from violating such order or any part thereof. The court may, upon conclusion of its hearing, enforce its decree by a permanent injunction or other appropriate remedy. Service of such complaint and of all notices may be made upon such association by service upon any officer or agent thereof engaged in carrying on its business, or on any attorney authorized to appear in such proceeding for such association, and such service shall be binding upon such association, the officers, and members thereof.

The Criminal Appeals Act of March 2, 1907, c. 2564, 34 Stat. 1246, U. S. C., Title 18, Section 682, as amended, is as follows:

An appeal may be taken by and on behalf of the United States from the district courts direct to the Supreme Court of the United States in all criminal cases, in the following instances, to wit:

From a decision or judgment quashing, setting aside, or sustaining a demurrer to, any indictment, or any count thereof, where such decision or judgment is based upon the invalidity, or construction of the statute upon which the indictment is founded.

From a decision arresting a judgment of conviction for insufficiency of the indictment, where such decision is based upon the invalidity or construction of the statute upon which the indictment is founded.

From the decision or judgment sustaining a special plea in bar, when the defendant has not been put in jeopardy.

The appeal in all such cases shall be taken within thirty days after the decision or judgment has been rendered and shall be diligently prosecuted and shall have precedence over all other cases.

Pending the prosecution and determination of the appeal in the foregoing instances, the defendant shall be admitted to bail on his own recognizance: *Provided*, That no appeal shall be taken by or allowed the United States in any case where there has been a verdict in favor of the defendant.

Section 238 of the Judicial Code, as amended by the Act of February 13, 1925, c. 229, 43 Stat. 936, U. S. C., Title 28, Section 345, is as follows:

A direct review by the Supreme Court of an interlocutory or final judgment or decree of a district court may be had where it is so provided in the following sections or parts of sections, and not otherwise:

- (1) Section 29 of Title 15, and section 45 of Title 49.
- (2) Section 682 of Title 18, where the decision of the district court is adverse to the United States.
- (3) Section 380 of this title.
- (4) So much of sections 47 and 47a of this title as relate to the review of interlocutory and final judgments and decrees in suits to enforce, suspend, or set aside orders of the Interstate Commerce Commission other than for the payment of money.
- (5) Section 217 of Title 7.

# FILE COPY

SUPREME COURT OF THE UNITED

Bills - Supreme Court, U. S.  
FILED

552-18 1939

CHARLES ELMORE GROPLEY  
CLERK

OCTOBER TERM, 1939

No. 397

THE UNITED STATES OF AMERICA,

*Appellant,*

vs.

THE BORDEN COMPANY, CHARLES L. DRESSEL,  
HARRY M. RESER, ET AL.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR  
THE NORTHERN DISTRICT OF ILLINOIS.

STATEMENT OPPOSING JURISDICTION ON BEHALF  
OF APPELLEES, ASSOCIATED MILK DEALERS,  
INC., PAUL POTTER AND LELAND SPENCER.

FRED C. NONNAMAKER, JR.,  
BEN H. MATTHEWS,  
HARRY J. DUNBAUGH,  
JAMES P. DILLIE,

*Counsel for Appellees.*

ISHAM, LINCOLN & BEALE,

*Of Counsel.*

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SUPREME COURT OF THE UNITED STATES  
OCTOBER TERM, 1939

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No. 397

---

UNITED STATES OF AMERICA

vs.

THE BORDEN COMPANY, ET AL.,

*Defendants.*

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APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR  
THE NORTHERN DISTRICT OF ILLINOIS, EASTERN DIVISION.

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STATEMENT OF GROUND MAKING AGAINST  
JURISDICTION.

Filed September 2, 1939.

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Come now Associated Milk Dealers, Inc., Paul Potter and Leland Spencer, by their respective attorneys, and show the following grounds making against jurisdiction of the Supreme Court of the United States herein:

The United States seeks to appeal from an order sustaining demurrers of these defendants to the four counts of

the indictment filed herein. As to Count Three of said indictment, insofar as these defendants are concerned, the demurrs were sustained for the reason that said count was fatally defective for duplicity as well as failing to allege definitely a restraint of interstate commerce. It is apparent that the invalidity or construction of a statute certainly is not involved, so far as these defendants are concerned, in the decision on Count Three, and therefore the judgment as to Count Three, in respect to them, is not appealable. This is conceded in the Statement of Jurisdiction filed on behalf of the United States, wherein it is said:

“The third count is here involved only insofar as demurrs interposed by the Pure Milk Association, its officers and agents, were sustained.”

The demurrs of these defendants were sustained as to Counts One, Two and Four of the indictment, for the reason that no indictment will lie under the Act of July 2, 1890, 26 Sta. 209, Title 15 U. S. C. A. Sec. 1 (hereinafter referred to as the “Sherman Act”) with respect to the production and marketing of agricultural products, including milk, for the reason that such products are removed from the purview of Section 1 of the Sherman Act by the Act of May 12, 1933, 48 Stat. 31, as amended August 24, 1935, 49 Stat. 750, and as re-enacted and amended by the Agricultural Marketing Agreement Act of 1937, 30 Stat. 246, Title 7 U. S. C. A. Supp. IV, par. 601 *et seq.* (hereinafter referred to as the “Agricultural Marketing Acts”).

The United States contends that the decision sustaining the demurrs to Counts One, Two and Four on the grounds stated is subject to review by direct appeal to the Supreme Court under Title 18 U. S. C. A. Sec. 682, Act of March 2, 1907, c. 2564, 34 Stat. 1246, as amended (hereinafter referred to as the “Criminal Appeals Act”); predicated its contention, first, upon the ground that the judgment is based

upon a construction of the statute upon which the indictment is founded, and second, upon the ground that the judgment is one sustaining a plea in bar. These defendants contend that jurisdiction of this court cannot be sustained on either ground.

**The judgment sustaining demurrers did not involve a construction of Section 1 of the Sherman Act upon which the indictment is founded.**

It is clear from the wording of the indictment that all of the counts here involved are founded upon Section 1 of the Sherman Act. Section 1 of the Sherman Act was not construed by the opinion or order of the District Court. Examination of said opinion and order discloses that every attack made by these defendants upon the counts here involved, other than that which the court sustained, was overruled. (See paragraph Fifth of the order of July 28, 1939.) From this it is apparent that apart from the effect given by the District Court to other statutes, that court held that Counts One, Two and Four of the indictment sufficiently stated offences under Section 1 of the Sherman Act.

The fact that the Court held that the acts charged in these counts of the indictment were within Section 1 of the Sherman Act distinguishes the present situation from that presented in the cases cited in the Statement of Jurisdiction filed on behalf of the United States, in particular the case of *United States v. Patten*, 226 U. S. 525. We are not contending that the acts charged would not, but for the Agricultural Marketing Acts, have brought the defendants within Section 1 of the Sherman Act. Our contention is that in spite of the fact that the acts charged would have brought the defendants under the Sherman Act prior to the enactment of the later laws, they are now no longer indictable under the Sherman Act because the new laws have

vested the Secretary of Agriculture with sole jurisdiction and have granted a new and exclusive method of prosecuting and punishing such acts.

**Judgment sustaining the demurrers did not amount to a decision or judgment sustaining a special plea in bar.**

It is the contention of the Government that the demurrers here dealt with constituted special pleas in bar. The defendants submit that this contention fails to take into consideration the fundamental difference between these two defences. A plea in bar always tenders an issue of fact. A demurrer always tenders an issue of law. It is true that the issue of fact tendered may be one of admitted fact, but whether admitted or contested, the facts thus pleaded are singled out of the opponents' pleading and set up as a bar. In the case of a general demurrer, facts pleaded by the opposition are conceded and the argument is presented that in law they constitute no cause of action. Several cases have been presented by the Government in which motions to quash, pleas in abatement, and even demurrers have been held to be in effect special pleas in bar, but an examination of all of these cases reveals that the pleading in question was in truth tendering an issue of fact and the ruling of the Court was merely to the effect that the appellation appended to the pleading was inconsequential in view of that fact. In one of the cases cited in the Statement of Jurisdiction submitted by the United States—that of *United States v. Goldman*, 277 U. S. 229—the Statute of Limitations was raised by a motion to dismiss the information. This was held tantamount to a special plea setting up at bar the admitted facts set forth in the information. The Court said (page 236) :

"Here the motion to dismiss raised the bar of the statute of limitations upon the facts appearing on the

face of the information, and was equivalent to a special plea in bar setting up such facts. And the effect of sustaining the motion was the same as if such a special plea in bar had been interposed and sustained."

In the case of *United States v. Thompson*, 251 U. S. 407, also cited by the Government, the distinction between pleas in bar and dilatory pleas is explained at length. It is the contention of the defendants that the application of these principles to the case at bar demonstrates that the defence presented by defendants' demurrers was not one in bar but rather one in abatement. As stated by Stephen on "Pleading," page 47:

"A plea in bar is distinguished from all other pleas of dilatory class, as impugning the right of action altogether, instead of merely tending to divert the proceedings to another jurisdiction or suspend them or abate the particular writ or declaration. It is in short a substantial and conclusive answer to the action."

As said by this court in the *Thompson* case, the distinction between a plea in abatement and a plea in bar is that the former delays the suit, while the latter destroys the cause of action.

In the light of the ruling by the District Court, we do not contend here that prosecution of the acts charged is barred by reason of the Agricultural Marketing Acts; our contention is that by reason of said legislation the prosecution of the acts charged against the defendants by indictment is abated and relegated to the control and regulation of the Secretary of Agriculture under the new laws.

This latter contention is supported by the action of the Government taken within a short time after the judgment of the District Court was entered in this case, for it appears that the Secretary of Agriculture, pursuant to the authority vested in him by the Agricultural Marketing Act,

issued an order, with the approval of the President, regulating the marketing of milk in the area covered by the indictment herein. (See Vol. IV, Federal Register, No. 167, p. 3764, issued on August 30, 1939.)

Respectfully submitted,

(Signed) FRED C. NONNAMAKER, JR.,

*Attorney for Associated Milk Dealers,  
Inc., and Paul Potter.*

(Signed) HARRY J. DUNBAUGH,

(Signed) ISHAM, LINCOLN & BEALE,

(Signed) BEN H. MATTHEWS,

(Signed) JAMES P. DILLIE,

*Attorneys for Leland Spencer.*

(3567)

FILE COPY

Supreme Court, U. S.  
ILLINOIS

SEP 18 1939

SUPREME COURT OF THE UNITED STATES  
OCTOBER TERM, 1939

CHARLES EUGENE GROPLEY  
CLERK

No. 397

THE UNITED STATES OF AMERICA,

*Appellant,*

*vs.*

THE BORDEN COMPANY, CHARLES L. DRESSEL,  
HARRY M. RESER, ET AL.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR  
THE NORTHERN DISTRICT OF ILLINOIS.

STATEMENT OPPOSING JURISDICTION ON BEHALF  
OF APPELLEES, PURE MILK ASSOCIATION, DON  
M. GEYER, EDWARD F. COOKE, E. E. HOUGHTBY,  
F. J. KNOX, LOWELL D. ORANGER AND JOHN P.  
CASE.

GEORGE W. LENNON,  
EDWARD J. HENNESSY,  
W. C. GRAVES,  
MARTIN BURNS,  
*Counsel for Appellees.*

SCHUYLER & HENNESSY,  
HENRY E. JACOBS,  
*Of Counsel.*

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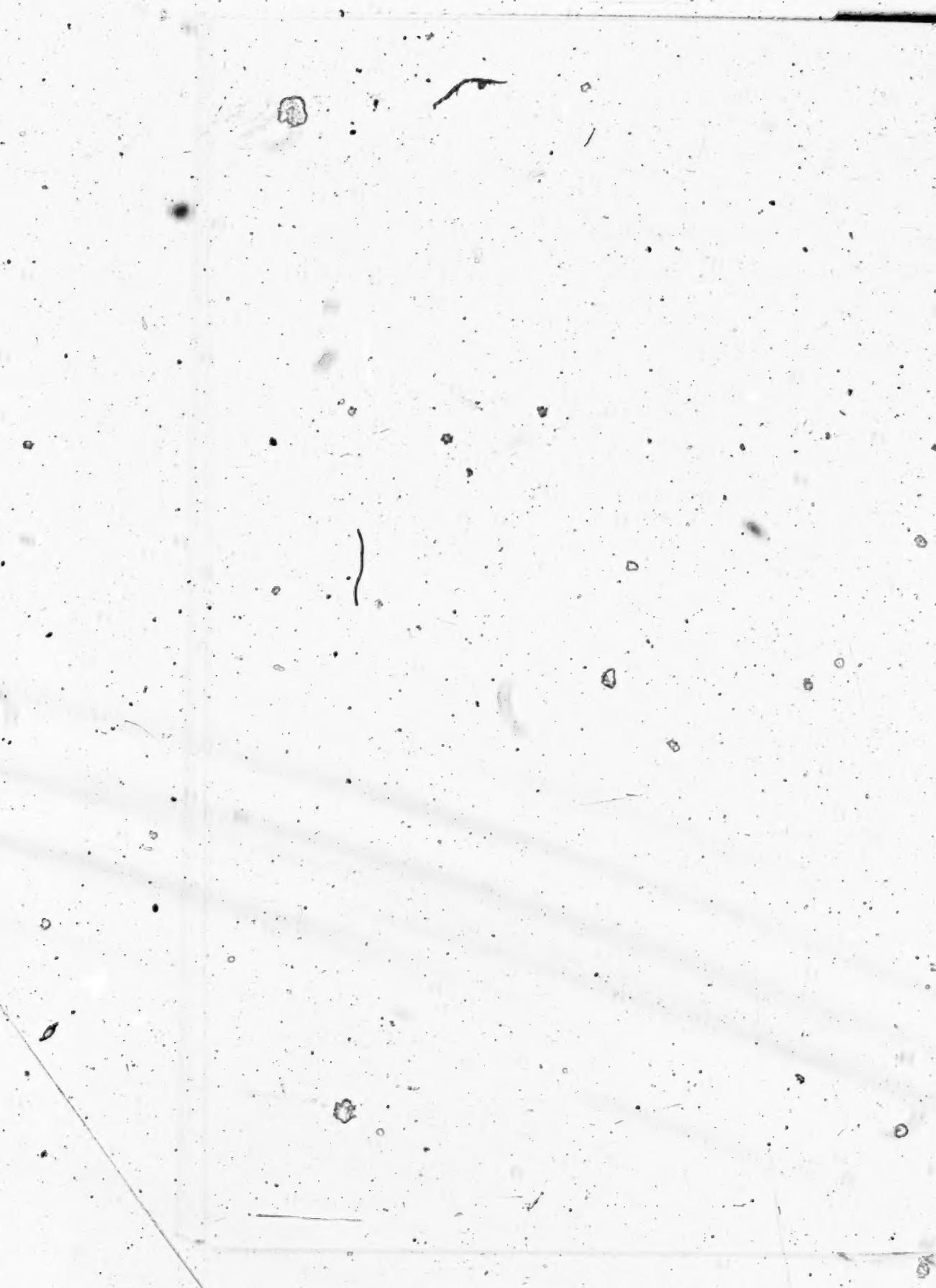
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IN THE DISTRICT COURT OF THE UNITED STATES  
FOR THE NORTHERN DISTRICT OF ILLINOIS  
EASTERN DIVISION

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No. 31197

---

UNITED STATES OF AMERICA

vs.

THE BORDEN COMPANY ET AL.,

*Defendants.*

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**STATEMENT AGAINST JURISDICTION.**

Filed September 2, 1939.

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Come now Pure Milk Association, a corporation, Don N. Geyer, Edward F. Cooke, E. E. Houghtby, F. J. Knox, Lowell D. Oranger and John P. Case, defendants herein, by their attorneys, by authority of Rule 12 as amended of the Supreme Court of the United States, and file this statement of matters or grounds making against the jurisdiction of this Court as asserted by the United States of America, appellant herein, asking for a review of the judgment entered in this cause by appeal to the Supreme Court of the United States, and say:

1. That the jurisdiction for this appeal cannot be maintained under the provisions of 28 U. S. C. A. 345, except as paragraph (2) thereof refers to 18 U. S. C. A. 682.

2. That the decision or judgment appealed from is not based upon the validity or construction of the statute upon which the indictment is founded, but upon the validity and interpretation of the several Acts of Congress passed subsequently to the enactment of the statute upon which the indictment is founded, namely:

- (a) The Clayton Act of October 15, 1914, 15 U. S. C. A. 12, *et seq.* (38 Stat. 730, *et seq.*).
- (b) The Capper-Volstead Act of February 15, 1922, 7 U. S. C. A. 291, 292 (42 Stat. 388).
- (c) The Cooperative Marketing Act of July 2, 1926, 7 U. S. C. A. 451, *et seq.* (44 Stat. 802, *et seq.*).
- (d) The Agricultural Marketing Act of June 15, 1929, 12 U. S. C. A. 1141, *et seq.* (46 Stat. 388).
- (e) The Agricultural Adjustment Act of May 12, 1933, 7 U. S. C. A. 601, *et seq.* (49 Stat. 750).
- (f) The Robinson-Patman Act of 1936, 15 U. S. C. A. 13, *et seq.* (49 Stat. 1526, *et seq.*).
- (g) The Agricultural Adjustment Act of May 12, 1933, as amended and reenacted by the Agricultural Marketing Agreement Act of 1937, 7 U. S. C. A. 601, *et seq.* (50 Stat. 246, *et seq.*).

3. That the decision or judgment appealed from is based upon the application, force and effect of the acts of Congress hereinbefore mentioned which supervise, regulate or control the production and marketing of agricultural products, and in basing its decision or judgment thereupon the Court did not construe or declare to be invalid the statute upon which the indictment is founded.

See Opinion filed July 13, 1939.

See "Order and Judgment on Demurrers and Motions to Quash filed by the Several Defendants, as shown of record" entered July 28, 1939.

4. That the decision or judgment appealed from is not based upon the invalidity of any act of Congress.

See Opinion filed July 13, 1939.

5. That the claim of jurisdiction for appeal of the decision or judgment to the Supreme Court of the United States is not supported by the following authorities:

*United States v. Colgate & Co.*, 250 U. S. 300, 63 L. Ed. 992, 39 S. Ct. Rep. 465, 7 A. L. R. 443;

*United States v. Carter*, 34 S. Ct. 173, 231 U. S. 492, 58 L. Ed. 330;

*United States v. Hastings*, 56 S. Ct. 218, 296 U. S. 188, 80 L. Ed. 148;

*United States v. Halsey Stuart & Co.*, 56 S. Ct. 299, 296 U. S. 451, 80 L. Ed. 323;

*United States v. Storrs*, 47 S. Ct. 221, 272 U. S. 652, 71 L. Ed. 460.

6. That the "Order and Judgment on Demurrers and Motions to Quash filed by the Several Defendants, as shown of record" entered July 28, 1939, appealed from is not a decision or judgment sustaining a special plea in bar.

*U. S. v. Storrs et al., supra.*

7. That the inclusion of the words "special pleas in bar" wherever the same appear in the *ex parte* "Order allowing Appeal to the Supreme Court of the United States" filed August 17, 1939, cannot be construed as aiding or supporting the jurisdiction claimed for this appeal.

*U. S. v. Storrs et al., supra.*

8. That the "Order and Judgment on Demurrers and Motions to Quash filed by the Several Defendants, as shown of record" entered July 28, 1939, from which appellant seeks an appeal, is not a decision or judgment sustaining a special plea in bar in that the statutes upon which these defendants rely to support their demurrers and motions to quash gives

the United States of America new and different remedies exclusive and in lieu of initial criminal proceedings to correct the wrongs complained of in the indictment.

See Acts cited in Paragraph 2 hereof.

9. That the "Order and Judgment on Demurrers and Motions to Quash filed by the Several Defendants, as shown of record" entered July 28, 1939, is not a decision or judgment sustaining a special plea in bar even though the allegations of the indictment might be sufficient to have maintained a criminal prosecution under Section 1 of the Sherman Act prior to the enactment of the statutes upon which these defendants rely to support their demurrers and motions to quash filed in reply to the indictment. The statutes so relied upon give sole, exclusive and plenary power to the Secretary of Agriculture of the United States to institute the initial action for redress of the wrongs complained of in the indictment by and through the proceedings defined in the statutes relied upon.

See Acts cited in Paragraph 2 hereof.

Respectfully submitted,

(Signed) GEORGE W. LENNON,

(Signed) EDWARD J. HENNESSY,

(Signed) W. C. GRAVES,

(Signed) MARTIN BURNS,

*Attorneys for Defendants, Pure Milk Association, Don N. Geyer, Edward F. Cooke, E. E. Houghtby, F. J. Knox, Lowell D. Oranger and John P. Case.*

SCHUYLER & HENNESSY,  
HENRY E. JACOBS,  
*Of Counsel.*

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WILSON

SEP 18 1939

STATES

MURRAY GROPLEY  
CLERK

SUPREME COURT OF THE UNITED

OCTOBER TERM, 1939

No. 397

THE UNITED STATES OF AMERICA,

*Appellant,*

*vs.*

THE BORDEŃ COMPANY, CHARLES L. DRESSEL,  
HARRY M. RESER, ET AL.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE  
NORTHERN DISTRICT OF ILLINOIS.

STATEMENT OPPOSING JURISDICTION AND MOTION TO DISMISS ON BEHALF OF APPELLEES SIDNEY WANZER & SONS, INC., INTERNATIONAL DAIRY COMPANY, GORDON B. WANZER, H. STANLEY WANZER, LOUIS JANATA AND MILK DEALERS' BOTTLE EXCHANGE.

LOY N. McINTOSH,  
BERNHARDT FRANK,  
*Counsel for Appellees.*

GANN, SECORD, STEAD & McINTOSH,

*Of Counsel.*

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IN THE DISTRICT COURT OF THE UNITED STATES  
FOR THE NORTHERN DISTRICT OF ILLINOIS  
EASTERN DIVISION

---

No. 31197

---

UNITED STATES OF AMERICA,

vs.

THE BORDEN COMPANY, ET AL.,

*Defendants.*

---

STATEMENT OF DEFENDANTS (APPELLEES) SIDNEY WANZER & SONS, INC., A CORPORATION; INTERNATIONAL DAIRY COMPANY, A CORPORATION; GORDON B. WANZER, H. STANLEY WANZER, LOUIS JANATA, AND MILK DEALERS' BOTTLE EXCHANGE, A CORPORATION, IN OPPOSITION TO JURISDICTION OF SUPREME COURT OF THE UNITED STATES.

---

Conformably with Rule 12 of the Supreme Court of the United States, as amended, defendants (appellees) named in above caption respectfully present this statement in opposition to the jurisdiction of said Supreme Court to entertain the appeal allowed herein under the Criminal Appeals Act. Said named defendants (for convenience referred to as

the Wanzer Group) filing this opposing statement, filed their several demurrers containing the specification, as Paragraph 5 of each thereof, that sole and exclusive jurisdiction over the production and marketing of milk had been devolved upon the executive branch of the government and withdrawn from initial judicial power. The defendants filing this opposing statement presented a printed opening brief and a printed reply brief in support of said demurrers. No plea in bar raising the contention as to supremacy and exclusiveness of executive power was filed by any defendant, nor was any special plea of any nature filed or presented. Not until the hearing on the settlement of the order sustaining the demurrers was there any intimation that any demurrer was to be considered as a special plea in bar. At the last named hearing, counsel for the government for the first time intimated that, under the limitations of the Criminal Appeals Act, there might be doubt as to jurisdiction unless said demurrers were treated as special pleas in bar.

With these preliminary observations in mind, let us proceed to reply in the sequence of the government's statement of jurisdiction:

A. The statutory jurisdiction of the Supreme Court under the Criminal Appeals Act is limited and strictly construed. That jurisdiction confers the "exceptional right to review in favor of the United States (*United States v. Koitel*, 211 U. S. 370, 399), and is "an innovation in criminal jurisdiction in certain classes of prosecutions, it cannot be extended beyond its terms" (*United States v. Dickinson*, 213 U. S. 92, 103).

B. The government's statement recites, "The Statute of the United States, the construction of which is involved herein, is Section 1 of the Sherman Act . . ."—a penal statute providing for punishment "by fine not exceeding \$5000, or by imprisonment not exceeding one year, or by

both said punishments, in the discretion of the court." (U. S. C. Title 15, Sec. 1; 26 Stat. 209.)

C. The defendants (appellees) filing this opposing statement are distributors of fluid milk in the City of Chicago (excepting that one of their number, the Milk Dealers' Bottle Exchange, is a mere local plant facility engaged in the rendition of a mere service to local dealers). The court sustained the demurrers to Counts 1, 2 and 4 upon said Paragraph 5 of the demurrers filed by the Wanzer Group, wherein the question as to the exclusive, supreme and plenary jurisdiction of the Secretary of Agriculture over milk production and marketing was presented.

### I.

The "Construction" of Section 1 of the Sherman Act is not involved; wherefore the Supreme Court is without jurisdiction.

This is not a case where the decision on the demurrer to the indictment finds that "the acts charged are not within the statute" (cf. *United States v. Patten*, 226 U. S. 525, 535). Here the decision of the district court is a finding that said court had been deprived of initial judicial power over the subject matter set forth in the indictment by the Agricultural Adjustment Act of May 12, 1933 (48 Stat. 31), as amended August 24, 1935 (49 Stat. 750), and as reenacted and amended by the Agricultural Marketing Agreement Act of 1937 (50 Stat. 246).

It is elementary that two or more different statutes cannot be considered in the process of construction unless such statutes be *in pari materia*. As stated in *United States v. Anderson*, 9 Wall. (U. S.) 56,

"The two acts cannot be construed *in pari materia*. The one is penal, the other remedial; the one claims a right, the other concedes a privilege."

The scope of "construction" of a statute is defined in *Lake County v. Rollins*, 130 U. S. 662, at 670:

"To get at the thought of meaning expressed in a statute, a contract or a Constitution, the first resort, in all cases, is to the natural signification of the words, in the order of grammatical arrangement in which the framers of the instrument have placed them. If the words convey a definite meaning, which involved no absurdity nor any contradiction of other parts of the instrument, then that meaning, apparent on the face of the instrument, must be accepted, and neither the courts nor the Legislature have the right to add to it or take from it. . . . So, also, where a law is expressed in plain and unambiguous terms, whether those terms are general or limited, the legislature should be intended to mean what they have plainly expressed, and consequently no room is left for construction."

Obviously Section 1 of the Sherman Act and the Agricultural Acts cannot be said to be *in pari materia*; and unless the separate, several and remedial Agricultural Acts be held to be *in pari materia* with Section 1 of the Sherman Act, said Agricultural Acts cannot be drawn within the process of construction of the separate, unrelated and *penal* statute, viz., Section 1 of the Sherman Anti-Trust Act. Jurisdiction of the appeal, therefore, fails.

## II.

The specification of the Wanzer demurrers, as to the exclusiveness of executive power over milk production and marketing does not constitute a special plea in bar.

The function of a special plea in bar is to set up a defense dehors the record, as the cases cited on the last page of the government's jurisdictional statement disclose.

Thus citizenship of an Indian charged with murder of

another Indian (*United States v. Celestine*, 215 U. S. 278); the defense of the statute of limitations (*United States v. Barber*, 219 U. S. 72; *United States v. Goldman*, 277 U. S. 299); and the defenses of former jeopardy or acquittal (*United States v. Oppenheimer*, 242 U. S. 85; *United States v. Thompson*, 251 U. S. 407) represent the range of instances relied upon by the government to support jurisdiction on the theory that the said demurrsers constituted a special plea in bar.

Obviously, the defenses of statute limitations and of former jeopardy or acquittal present a subject matter widely different from that of the instant case; which leaves the Indian case. (*United States v. Celestine*, 215 U. S. 278) as the basis of the government's theory that Paragraph 5 of the Wanzer demurrers constituted a special plea in bar.

In *United States v. Celestine*, 215 U. S. 278, the Supreme Court reversed an order sustaining a special plea in bar in a prosecution against an Indian for murder of another Indian within the limits of an Indian Reservation in the State of Washington. The Supreme Court held that such an offense by an Indian so circumstanced was not excepted from the exclusive jurisdiction of the Federal courts under the Act of March 3, 1885, Section 9, because both parties held land patents from the United States issued under the authority of the Treaty with the Omahas of March 16, 1854, and the Treaty of Point Elliott of January 22, 1885, and that the provisions of the Act of February 8, 1887, Section 6, providing that, upon the completion of land allotments and the patenting of the lands to said Indian allottees, such Indians, upon certain conditions, are declared to be citizens of the United States, did not divest the jurisdiction of Federal courts over offenses committed by one Indian upon the person of another Indian within the limits of a reservation. The special plea filed by the Indian was directed against the

jurisdiction of the circuit court on the ground that he "has been and still is a citizen of the United States, and therefore subject to the laws of the territory and state of Washington."

Concerning the Indian's special plea in bar, the Supreme Court, in the *Celestine* case, in construing Paragraph 4 of the Criminal Appeals Act of 1907 (relating to review of special pleas in bar), at page 283, said:

"The fourth paragraph of the act of March 2, 1907, supra, authorizes a review of a 'decision or judgment sustaining a special plea in bar, when the defendant has not been put in jeopardy.' The defendant in this case had not been put upon trial, therefore he had not been in jeopardy. The decision of the circuit court sustained the special plea in bar. This fourth paragraph differs from the two preceding, in that the review authorized by them is limited to cases in which 'the decision or judgment is based upon the invalidity or construction of the statute upon which the indictment is founded,' while no such limitation appears in this paragraph. The full significance of this difference need not now be determined, but clearly the fourth paragraph gives to this court a right to review the precise question decided by a trial court in sustaining a special plea in bar, although that decision may involve the application rather than the validity or construction, strictly speaking, of the statute upon which the indictment was founded."

The above quoted differentiation of the language of the fourth paragraph of the Criminal Appeals Act has no pertinency to the instant case; for the question as to the supreme, exclusive and plenary jurisdiction of the Secretary of Agriculture *does not present an application of the statute upon which the indictment is based*, viz., Section 1 of the Sherman Act, but rather of the Agricultural Acts.

In the *Celestine* case, the facts surrounding the Indian

were personal to him and resulted from his voluntary action.

In the instant case, the Agricultural Acts have withdrawn initial judicial power from the Federal district courts over the general subject matter of the production and marketing of agricultural commodities, including milk, thereby carving from Section 1 of the Sherman Act any application to such commodities. In other words, the Agricultural Acts have disqualified district courts from exercising initial judicial power. The decision of the District Court that it was without judicial power and that the Secretary of Agriculture has exclusive power over agricultural commodities, including milk, was a finding relative to the disability of the District Court itself, and did not relate to any claim of right or privilege of the defendants arising out of any voluntary action or conduct on their part. Such a construction of Federal law by the District Court itself, as to its own lack of jurisdiction, is not within the purview or scope of a special plea in bar under which the application of a statute may be applied to voluntary action on the part of a defendant as distinguished from disability inhering within the jurisdiction of a court, as a court.

The very fact that the learned counsel for the government base their sole substantial ground of jurisdiction under the Criminal Appeals Act upon the theory that Paragraph 5 of the Wanzer demurrers constituted a special plea in bar, is a conclusive demonstration that the government has grave doubt concerning the jurisdiction of the Supreme Court to entertain the appeal.

The picture of the Agricultural legislation beginning with 1933, as part of the Recovery program, in the period of world-wide economic chaos, is not one of fact dependent upon voluntary action or status of the citizen. That legislation appears on the Federal statute books. The several

departments of government are presumed to know the Federal statutes. If one department of government, viz., Department of Justice, overlooks an existing code of laws having the effect of removing initial judicial power over a subject matter, the citizen confronted with an indictment under Section 1 of the Sherman Act is not called upon to file a special plea in bar to that effect. Nor is such a citizen to blame for the narrow limitations of the government's right of review under the Criminal Appeals Act. Until Congress, by appropriate amendment, enlarges the scope of review under the Criminal Appeals Act, the question presented: Whether the supreme, exclusive and plenary jurisdiction of the Secretary of Agriculture over the production and marketing of agricultural products, including milk, by the agricultural legislation since 1933, has removed initial judicial power, so as to carve from the purview of Section 1 of the Sherman Act any application to such commodities, does not present a question of "*construction*" or, indeed, of the "*application*" of the statute upon which the indictment herein was returned.

### III.

**The instances of monopoly cases involving agricultural products or railroads are not in point.**

The government closes its statement of jurisdiction with the suggestion that the question decided by the District Court is contrary to the decisions of the Supreme Court in Sherman Act cases involving agricultural products; but, as none of those cases raised the point decided by the District Court and as all of them were prior to the Agricultural Adjustment Act of 1933, they are not in point. The last case, *Sugar Institute v. United States*, 297 U. S. 553, was decided as late as March 30, 1936, prior to the Agricultural Marketing Agreement Act of 1937. So with the four rail-

road cases, the last in volume 228 U. S., no similarity exists because of incidental control by the Interstate Commerce Commission. Clearly acquisition of the capital stock of a competing railroad, or agreements between railroads as to distribution of freight or passenger traffic, present an entirely different situation, especially in view of the course of amendment of the Interstate Commerce Commission legislation.

For the respective reasons herein presented, it is deferentially urged that the appeal should be dismissed for want of jurisdiction.

Respectfully submitted,

(Sgd.)

GANN, SECORD, STEAD AND  
McINTOSH,

LOY N. McINTOSH,  
BERNHARDT FRANK,

*Attorneys for Said Defendants (Appellees).*

IN THE  
SUPREME COURT OF THE UNITED STATES  
OCTOBER TERM, A. D. 1939

---

No. 397

---

UNITED STATES OF AMERICA,

*Appellant,*

*vs.*

THE BORDEN COMPANY ET AL.,

*Appellees.*

---

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR  
THE NORTHERN DISTRICT OF ILLINOIS, EASTERN DIVISION.

---

HONORABLE CHARLES E. WOODWARD, *District Judge.*

---

MOTION OF APPELLEES SIDNEY WANZER & SONS,  
INC., A CORPORATION; INTERNATIONAL DAIRY  
COMPANY, A CORPORATION; GORDON B. WAN-  
ZER, H. STANLEY WANZER, LOUIS JANATA, AND  
MILK DEALERS' BOTTLE EXCHANGE, A CORPO-  
RATION, TO DISMISS APPEAL.

---

Now come appellees, Sidney Wanzer & Sons, Inc., a cor-  
poration; International Dairy Company, a corporation;

Gordon B. Wanzer, H. Stanley Wanzer, Louis Janata, and Milk Dealers' Bottle Exchange, a corporation, by Loy N. McIntosh and Bernhardt Frank, their counsel, and move to dismiss the appeal herein for the reasons set forth in the statement of said appellees in opposition to the jurisdictional statement filed by the United States of America.

(Signed)

(Signed)

LOY N. MCINTOSH,  
BERNHARDT FRANK,  
*Counsel for Said Appellees.*

(3565)

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STATES

ALICE GROPLEY  
CLERK

SUPREME COURT OF THE UNITED

OCTOBER TERM, 1939

No. 397

THE UNITED STATES OF AMERICA,

*Appellant,*

vs.

THE BORDEN COMPANY, CHARLES L. DRESSEL,  
HARRY M. RESER, ET AL.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR  
THE NORTHERN DISTRICT OF ILLINOIS.

STATEMENT OPPOSING JURISDICTION AND MO-  
TION TO DISMISS OR AFFIRM ON BEHALF OF  
APPELLEES, MILK WAGON DRIVERS' UNION,  
LOCAL 753, ROBERT G. FITCHIE, JAMES G. KEN-  
NEDY, STEVE C. SUMNER, FRED C. DAHMS, F.  
RAY BRYANT, JOHN O'CONNOR AND DAVID A.  
RISKIND.

JOSEPH A. PADWAY,  
*Counsel for Appellees.*

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IN THE DISTRICT COURT OF THE UNITED STATES  
NORTHERN DISTRICT OF ILLINOIS  
EASTERN DIVISION

---

No. 31197

---

THE UNITED STATES OF AMERICA,

*Plaintiff,*

*vs.*

THE BORDEN COMPANY, ET AL.,

*Defendants.*

---

**STATEMENT AGAINST JURISDICTION OF SUPREME  
COURT OF UNITED STATES.**

---

In compliance with Rule 12, Paragraph 3 of the Supreme Court of the United States as amended, defendants, Milk Wagon Drivers' Union, Local 753, Robert G. Fitchie, James G. Kennedy, Steve C. Sumner, Fred C. Dahms, F. Ray Bryant, John O'Connor and David A. Riskind, by Joseph A. Padway, their attorney, submit herewith their statement disclosing the grounds upon which they urge that the Supreme Court of the United States has no jurisdiction upon direct appeal from the Federal District Court to review the judgment entered in this cause, or in the alternative, no jurisdiction on direct appeal from the Federal District Court to review certain parts of said judgment, namely,

insofar as the judgment applies to Count III of the Indictment.

There is no statutory jurisdiction to review by direct appeal from the Federal District Court the judgment entered in this cause with regard to Count III of the Indictment for the following reasons:

1. The ruling on Count III finding that said Count was duplicitous in that it stated several and distinct crimes is a ruling upon pleading and is not a ruling based in any way upon the interpretation of the Sherman Anti-Trust Act. See *United States v. Stevenson*, 215 U. S. 190, 54 Law. Ed. 153 (1909).

2. Under the statute permitting direct review, the Supreme Court does not have jurisdiction on direct appeal where the trial court's decision was based upon the "technical insufficiency" of the Indictment to state a good cause of action within the meaning of the statute alleged to have been violated by the defendants. *United States v. Barber*, 219 U. S. 272, 55 Law. Ed. 97.

3. The meaning, i. e. the interpretation, of the facts alleged in the Indictment by the trial court will be accepted as final by the Supreme Court of the United States in considering the question whether or not the statute permitting direct appeal is concerned. *United States v. Yuginovich*, 256 U. S. 450; 45 Law. Ed. 1131; *United States v. Colgate Co.*, 250 U. S. 300; 63 Law. Ed. 992, 7 A. L. R. 443; *United States v. Patten*, 226 U. S. 525, 57 Law. Ed. 33, 44 L. R. A. Ms. 325.

Accordingly, the meaning placed by the trial court that as a matter of fact that

"a restraint of interstate commerce is not definitely alleged in Count III in that it is not definitely charged that the milk sold by stores and independent distrib-

• utors was or had been the subject of interstate commerce."

must be accepted as final by the Supreme Court of the United States.

Accordingly, a ruling of the trial court which is based on the insufficiency of facts to state a violation of the Sherman Anti-Trust Act does not involve the validity or construction of the statute within the meaning of the provisions of the Criminal Code giving the United States Supreme Court jurisdiction to entertain a direct appeal. *United States v. Pacific Railway*, 228 U. S. 87, 57 Law. Ed. 742; *United States v. Hastings*, 296 U. S. 188, 80 Law. Ed. 148.

4. On the direct appeal under the provisions of the Criminal Code, the scope of review is limited to the particular instances enumerated in the Statute. The whole case is not open to review in the Supreme Court. *United States v. Keitel*, 211 U. S. 404 at 406, 53 Law. Ed. 251; *United States v. Kissel*, 218 U. S. 601, 54 Law. Ed. 1168.

Accordingly, the Supreme Court of the United States has no jurisdiction to revise the interpretation of Count III of the Indictment as adopted by the trial court. *United States v. Keitel*, 211 U. S. 370, 53 Law. Ed. 230; *United States v. Stevenson*, 215 U. S. 190, 54 Law. Ed. 153; *United States v. Miller*, 223 U. S. 599, 56 Law. Ed. 568; *United States v. Carter*, 231 U. S. 492, 58 Law. Ed. 330.

Accordingly, the direct appeal will not involve Count III insofar as these defendants are concerned. *United States v. Portate*, 235 U. S. 27, 59 Law. Ed. 111.

(Signed) JOSEPH A. PADWAY.

IN THE DISTRICT COURT OF THE UNITED STATES  
NORTHERN DISTRICT OF ILLINOIS  
EASTERN DIVISION

---

No. 31197

---

UNITED STATES OF AMERICA

*vs.*

THE BORDEN COMPANY, ET AL.

---

**MOTION.**

Now come Milk Wagon Drivers' Union, Local 753, Robert G. Fitchie, James G. Kennedy, Steve C. Sumner, Fred C. Dahms, F. Ray Bryant, John O'Connor and David A. Riskind, defendants, by Joseph A. Padway, their attorney, and respectfully move the Court to dismiss the appeal or to affirm the judgment of Judge Woodward of the District Court of the United States, Northern District of Illinois, Eastern Division, of July 28th, 1939, or in the alternative to dismiss the appeal or affirm the judgment in part insofar as it relates to Count III of the Indictment.

(Signed) JOSEPH A. PADWAY.

(3568)

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No. 397

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CHARLES ELLIOTT

IN THE  
**Supreme Court of the United States.**

OCTOBER TERM, A. D. 1939.

UNITED STATES OF AMERICA,

*Appellant,*

*vs.*

THE BORDEN COMPANY, CHARLES L. DRESSEL,  
HARRY M. RESER, ET AL.,

*Appellees.*

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES  
FOR THE NORTHERN DISTRICT OF ILLINOIS

**BRIEF AND ARGUMENT FOR APPELLEES**

Sidney Wanzer & Sons, Inc., a corporation,  
International Dairy Company, a corporation,  
Gordon B. Wanzer, H. Stanley Wanzer,  
Louis Janača and Milk Dealers' Bottle  
Exchange, a corporation.

LOY N. McINTOSH,  
BERNHARDT FRANK,

*Counsel for said Appellees.*

GANN, SECORD, STEAD AND McINTOSH,  
*Of Counsel.*

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IN THE  
**Supreme Court of the United States**

OCTOBER TERM, A. D. 1939.

UNITED STATES OF AMERICA,

*Appellant,*

*vs.*

THE BORDEN COMPANY, CHARLES L. DRESSEL,  
HARRY M. RESER, ET AL.,

*Appellees.*

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES  
FOR THE NORTHERN DISTRICT OF ILLINOIS

**BRIEF AND ARGUMENT FOR APPELLEES**

Sidney Wanzer & Sons, Inc., a corporation,  
International Dairy Company, a corporation,  
Gordon B. Wanzer, H. Stanley Wanzer,  
Louis Janata and Milk Dealers' Bottle  
Exchange, a corporation.

**OPINION BELOW**

The opinion of the district judge, Honorable Charles E. Woodward, appears at p. 98 of the printed record on file in this Court and is reported *sub nom. United States v. Borden Co. et al.*, 28 F. Supp. 177.

## JURISDICTION

These Appellees (referred to hereinafter as the Wanzer Group) have presented a motion to dismiss the appeal, which motion this Honorable Court has reserved for the hearing. As set forth in our motion to dismiss, the Appellees, on whose behalf this brief is filed, contend:

That the holding of the district court, in sustaining Specification 5 of the Wanzer demurrers (R. 115), that the several Agricultural Acts, beginning with the Agricultural Adjustment Act of 1933, as amended in 1935, and the Agricultural Marketing Agreement Act of 1937, in devolving upon the Secretary of Agriculture exclusive, supreme and plenary powers to regulate and administer agricultural commodities, and particularly milk, *have carved initial judicial power of the district courts over that subject matter, and that the subject matter presented by the indictment is not justiciable and relates solely to the supreme, exclusive and plenary domain of executive and administrative powers vested in the Secretary of Agriculture;* wherefore the judgment appealed from by the Government is not appealable under the Criminal Appeals Act (U. S. C. Tit. 18, sec. 682), whether said Specification 5 of the Wanzer Group demurrs be treated as a demurrer or as a plea in bar. It should be noted, however, that no plea in bar was filed raising this point as to executive jurisdiction.

In short, these Appellees contend that the lower federal courts are courts of limited jurisdiction; and that, while within the scope of such limited jurisdiction, as defined by the acts, as amended, creating them and defining the jurisdiction of such lower courts, the judicial power of the district courts, within the category of cases

as to which jurisdiction is devolved upon them by the legislation creating them, is plenary; but it is in the power of Congress to carve from the initial judicial power of the district courts initial jurisdiction over any subject matter and provide for original jurisdiction thereof by executive officer or administrative tribunal. As there can be no partnership of jurisdiction between the judicial branch and the executive branch of the Government, the long settled course of decision of this Honorable Court is that, where any substantial power over a subject matter is subject to executive or administrative jurisdiction, initial judicial power over that subject matter is carved from the scope of the jurisdiction of the district court. Stated simply, when Congress enacted the several Agricultural Acts, it automatically limited the jurisdiction of the district courts over matters as to which the Secretary of Agriculture was given jurisdiction to enter orders after hearing. Our position is that the *Criminal Appeals Act* does not contemplate appeals from findings by the district court that its (said district court's) jurisdiction under the respective Acts, as amended, creating it, has been carved away from initial judicial power.

At p. 1 of the Government's brief, is the recital that the appeal is prosecuted not only under the Criminal Appeals Act but under Title 28, U. S. C., sec. 345, relating to direct review by the Supreme Court, where, in subsection 2 appears the recital, "Section 682 of Title 18, where the decision of the District Court is adverse to the United States." (U. S. C. Tit. 28, sec. 345, Judicial Code, sec. 238, as amended.) So that it is apparent that U. S. C. Tit. 28, sec. 345, confers no additional grounds of jurisdiction, but merely refers to the right granted by the Criminal Appeals Act, as amended, viz., U. S. C. Tit. 18, sec. 682.

## STATEMENT

### A. The Indictment

The Government's statement omits the fact that the indictment, in each of the counts thereof, charges the commencement of the alleged conspiracy as "during the month of January, 1935." As this Court may judicially notice,<sup>1</sup> during January and February of 1935 and, indeed, up to March 2, 1935, these Appellees and others of the Appellees engaged as producers and distributors (as well as the entire subject matter set forth in each of the counts), operated under License 30 imposed by the Secretary of Agriculture upon the Chicago Milk Marketing Area on June first, 1934, and were under the supreme, exclusive and plenary jurisdiction of said executive and administrative authority.<sup>2</sup> The Government virtually admits, at p. 11 of its brief, that, under *United States v. Hastings*, 296 U. S. 188, the third count is eliminated from this submission and is not open for review.

<sup>1</sup>*Jones v. United States*, 137 U. S. 202;

*Duncan v. Navassa Phosphate Co.*, 137 U. S. 647;

*The Paquete Habana*, 175 U. S. 677;

*Heath v. Wallace*, 138 U. S. 573;

*Hoyt v. Russell*, 117 U. S. 401;

*New York Indians v. United States*, 170 U. S. 1.

<sup>2</sup>No allegation appears in any of the counts that a new conspiracy was entered into after March 2, 1935.

### B. Specification 5 of the Wanzer Group Demurrsers

Specification 5 of the Wanzer Group demurrsers (R. 51, 53, 55, 56, 50, 67), adopted by certain other of the Appellees, is as follows:

"5. The alleged conspiracy set forth in the indictment and each count thereto, relates to a subject matter that is not justiciable but is removed from the criminal jurisdiction of this court in that the Congress of the United States, in its plenary power as the legislative department of the federal government, has legislated to remove the subject matter of each count from the purview of section 1 of the Sherman Act and to devolve upon the executive department of the federal government power to regulate said subject matter by administrative action."

## ARGUMENT

---

### I.

#### THIS COURT HAS NO JURISDICTION UNDER THE CRIMINAL APPEALS ACT.

**A. As to the Government's erroneous theory that the construction of the Sherman Act is involved instead of the carving of initial judicial power of the District Court, itself, by reason of the enactment of the several agricultural acts.**

The Government contends that the jurisdiction of this Court under the Criminal Appeals Act may be supported on the ground that the judgment of the district court, sustaining the demurrers to the indictment, was based upon the construction of section 1 of the Sherman Act, upon which the indictment was founded.

We respectfully submit that the Government's entire argument as to jurisdiction under the Criminal Appeals Act is beside the point; for the lower court did not construe section 1 of the Sherman Act, nor did the lower court hold the Shernian Act invalid. As specifically stated in the opinion of the district court (28 Fed. Supp. at 187; R. 98):

"A study of statutory policy from the Sherman Act of 1890 to the Agricultural Marketing Agreement Act of 1937 shows a constant and growing tendency on the part of Congress to control and regulate the production and marketing of agricultural products, including milk, through the administrative agency of the Secretary of Agriculture. The whole theory and pol-

icy of the Agricultural Marketing Agreement Act is that of governmental control, regulation and supervision. The production and marketing of agricultural products, including milk, has, so far as interstate commerce is concerned, been removed from the sphere of trade and barter in a free agency to a status of dependence and obedience to the supreme, exclusive and plenary control of the Secretary of Agriculture, subject to judicial review in the mode provided by the statute.

*"The Court holds that, by the Agricultural Marketing Agreement Act the Congress has committed to the Executive Department, acting through the Secretary of Agriculture, full, complete and plenary power over the production and marketing, in interstate commerce, of agricultural products, including milk."*

There could be no clearer definition of what was in the mind of the district court than the above quoted language of the opinion, wherein the district judge specifically, in language admitting of no ambiguity, pointedly limits his finding and holding to the narrow issue that the district court, itself, was without jurisdiction of the subject matter by reason of the supreme, exclusive and plenary jurisdiction of the Secretary of Agriculture under the respective Agricultural Acts. Could there be a more specific record showing that the Sherman Act was not construed by the district court?

The Government confuses the carving away of initial judicial power with the resultant effect on classes of controversies arising under statutes over which the jurisdiction of the district courts has been limited by amendment or bill of the legislature creating and defining the jurisdiction of said courts.

Says the Government, at p. 21 of its brief: "The opinion of this Court in *United States v. Patten*, 226

U. S. 525, gives succinct answer to the Appellees' contention that the district court did not construe the Sherman Act, but merely gave effect to the other Acts."

But the *Patten* case has no application, for there the Court did not have before it a case of collision between initial judicial power and executive or administrative power. All that the language of the Court at p. 535 applies to is a situation where the district court has plenary jurisdiction under the Sherman Act and, acting within such plenary jurisdiction, finds that the acts charged in the indictment were not within the purview of the Sherman Act. But that is very different from the situation presented by the case at bar; for here it is the organic limitation or restriction of the initial judicial power of the district court, itself, by reason of the enactment of the several Agricultural Acts, devolving exclusive jurisdiction upon the Secretary of Agriculture.

To avoid the narrow issues, the Government urges that the construction of other statutes in relation to the Sherman Act, to determine the application of the Sherman Act to the acts charged, makes the decision no less a construction of the Sherman Act, and cites *U. S. v. Kapp*, 302 U. S. 214, wherein, in a prosecution for conspiracy, under section 37 of the Criminal Code, to violate the false claim statute (section 35 of the Criminal Code) presented a question of a construction within the meaning of the Criminal Appeals Act, notwithstanding that another statute was construed. But the Court distinctly says, in the *Kapp* case, at p. 216, that "The statute, at the violation of which the conspiracy is aimed, has been treated as the statute upon which the indictment is founded, within the meaning of the Criminal Appeals Act." In other words, constructions of statutes *in pari materia* is permissible; but this Court has ruled specifically in *United*

*States v. Anderson*, 9 Wall. (U. S.) 56, that two or more different statutes can not be construed in the process of construction, unless such statutes be *in pari materia*, for, says the Court (67): "The two acts can not be construed *in pari materia*. *The one is penal, the other remedial*; the one claims a right, the other concedes a privilege." Obviously, the Agricultural Acts, of themselves, and as constituting an implied amendment or repeal of statutes, as amended, creating and defining the jurisdiction of the district courts, were purely remedial and were in no sense penal or criminal, and therefore not *in pari materia* under the settled course of decision of this Honorable Court.

We respectfully refer the Court to the Statement Opposing Jurisdiction, filed by the Wanzer Group (see motion to dismiss), for a reply to the other authorities relied upon by the Government in support of jurisdiction under the Criminal Appeals Act. As shown in said Statement, there is—no jurisdiction in the Supreme Court under the Criminal Appeals Act, whether the demurrers be treated as demurrers or as pleas in bar.

It therefore follows that the authorities relied upon by the Government, to sustain its theory that the district court construed the Sherman Act, are without any application.

B. The settled course of decision of this Honorable Court, beginning with *Texas P. R. Co. v. Abilene Cotton Oil Co.*, 204 U. S. 426, and, indeed, expressed in several earlier cases, is that, where an executive or administrative body, endowed with fact-finding powers and authority to make administrative orders, is created by Congress, the jurisdiction of such executive or administrative body is initially supreme and exclusive, and initial judicial power over such subject matter is withdrawn.

The Government's brief concedes that there is some power in the Secretary of Agriculture to regulate and administer agricultural commodities, and particularly milk, but relies upon the lack of clarity as to the exclusive power of the Secretary in the premises as a basis for its erroneous theory that executive power and judicial power may coexist concurrently as to the same subject matter. The separation of departments in the Federal Constitutional system precludes such theory of concurrent authority and some authority, on the Government's own theory, having been given to the Secretary of Agriculture, all initial judicial power of the district courts is thereby removed and no justiciable controversy is presented by the subject matter of the indictment.

As well stated in *Meriwether v. Garrett*, 102 U. S. 472, at 515:

" \* \* \* a strict confinement of each department within its own proper sphere was designed by the founders of our government and is essential to its successful administration."

So in *McCray v. United States*, 195 U. S. 27, at p. 55:

"As aptly said by the court, speaking through Mr. Justice Miller, in *Kilbourn v. Thompson*, 103 U. S. 168, p. 190:

'It is believed to be one of the chief merits of the American system of written constitutional law, that all the powers intrusted to the government, whether State or National, are divided into the three grand departments, the executive, the legislative, and the judicial. That the functions appropriate to each of these branches of government shall be vested in a separate body of public servants, and that the perfection of the system requires that the lines which separate and divide these departments shall be broadly and clearly defined. It is also essential to the successful working of this system that the persons intrusted with power in any one of these branches shall not be permitted to encroach upon the powers confided to others, but that each shall by the law of its creation be limited to the exercise of the powers appropriate to its own department and no other.' "

In the recent case of *O'Donoghue v. United States*, 289 U. S. 516, at p. 530, the court says:

"The Constitution, in distributing the powers of government, creates three distinct and separate departments—the legislative, the executive, and the judicial. This separation is not merely a matter of convenience or of governmental mechanism. Its object is basic and vital, *Springer v. Philippine Islands*, 277 U. S. 189, 201, namely, to preclude a commingling of these essentially different powers of government in the same hands. And this object is none the less apparent and controlling because there is to be found in the Constitution an occasional specific provision conferring upon a given department certain functions, which, by their nature, would otherwise fall within the general scope of the powers of another. Such exceptions serve rather to emphasize the generally inviolate character of the plan.

"If it be important thus to separate the several departments of government and restrict them to the exercise of their appointed powers, it follows, as a logical corollary, equally important, that each department should be kept completely independent of the

others—independent not in the sense that they shall not cooperate to the common end of carrying into effect the purposes of the Constitution, but in the sense that the acts of each shall never be controlled by, or subjected, directly or indirectly, to, the coercive influence of either of the other departments. James Wilson, one of the framers of the Constitution and a justice of this court, in one of his law lectures said that the independence of each department required that its proceedings ‘should be free from the remotest influence, direct or indirect, of either of the other two powers.’ Andrews, *The Works of James Wilson* (1896), Vol. 1, p. 367. And the importance of such independence was similarly recognized by Mr. Justice Story when he said that in reference to each other, neither of the departments ‘ought to possess, directly or indirectly, an overruling influence in the administration of their respective powers.’ 1 Story on the Constitution, 4th ed. § 530. To the same effect, *The Federalist* (Madison) No. 48. And see *Massachusetts v. Mellon*, 262 U. S. 447, 488.”

There would be no reason for the enactment of provisions endowing the administrative or executive tribunals with certain powers if power was left in the courts to act concurrently with the executive or administrative tribunal without reference to previous action by the executive or administrative authority in the premises.

The doctrine is stated in *Texas & P. R. Co. v. Abilene Cotton Oil Co.*, 204 U. S. 426, at p. 441:

“Indeed no reason can be perceived for the enactment of the provision endowing the administrative tribunal; which the act created, with power, on due proof, not only to award reparation to a particular shipper, but to command the carrier to desist from violation of the act in the future, thus compelling the alteration of the old or the filing of a new schedule, conformably to the action of the Commission, if the power was left in courts to grant relief on complaint of any shipper, upon the theory that the

established rate could be disregarded and be treated as unreasonable, without reference to previous action by the Commission in the premises."

To the same effect see:

*Robinson v. Baltimore & Ohio R. Co.*, 222 U. S. 506, 509;

*Procter & Gamble Co. v. United States*, 225 U. S. 282;

*I. C. C. v. Louisville & N. R. Co.*, 227 U. S. 88, 92;

*Mitchell Coal Company v. Pennsylvania*, 230 U. S. 247;

*U. S. v. Louisville & N. R. Co.*, 235 U. S. 314, 320;

*Lehigh Valley R. Co. v. U. S.*, 243 U. S. 412;

*Louisville & N. R. Co. v. U. S.*, 245 U. S. 463;

*Skinner & Eddy Corp. v. United States*, 249 U. S. 557, 562;

*Block v. Hirsh*, 256 U. S. 135;

*Stafford v. Wallace*, 258 U. S. 495;

*Federal Trade Commission v. Curtis Publishing Company*, 260 U. S. 568;

*Federal Trade Commission v. Pacific States Paper Trade Association*, 273 U. S. 52;

*Tagg Bros. & Moorhead v. U. S.*, 280 U. S. 420, 443;

*Railroad Comrs. v. Great Northern R. Co.*, 281 U. S. 412;

*Phillips v. Commissioner of Internal Revenue*, 283 U. S. 589;

*Arizona Grocery Co. v. Atchison T. & S. F. R. Co.*, 284 U. S. 370, 384;

*United States Navigation Co. v. Cunard S. S. Co. Ltd.*, 284 U. S. 474, 483.

*St. Joseph Stockyards Co. v. United States*, 298 U. S. 38, 49;

*American Telephone & Telegraph Co. v. United States*, 299 U. S. 232;

- Swayne & Hoyt v. U. S.*, 300 U. S. 297, 307;  
*Anniston Mfg. Co. v. Davis*, 301 U. S. 337, 343-346;  
*Myers v. Bethlehem Shipbuilding Corp.*, 303 U. S. 41, 48;  
*Shields v. Utah, Idaho R. Co.*, 305 U. S. 177.  
*United States v. Rock Royal Cooperative, Inc.*, Advance Sheets 83, L. Ed. p. 981;  
*Rochester Telephone Corp. v. United States*, 307 U. S. 125.

In *Procter & Gamble Company v. U. S.*, 225 U. S. 282, the reason for the doctrine is stated at pages 298-299:

"Second, because the recognition of a right in a court to assert the power now claimed would of necessity amount to a substitution of the court for the Commission or at all events would be to create a divided authority on a matter where from the beginning primary singleness of action and unity was deemed to be imperative."

In *United States Navigation Co. v. Cunard SS Co., Ltd.*, 284 U. S. 474, the action was brought by the navigation company to enjoin respondents from continuing an alleged combination and conspiracy in violation of the Sherman Anti-Trust Act. The district court dismissed the amended appeal on the ground that the matters complained of were within the exclusive jurisdiction of the United States Shipping Board. This Court, in affirming the decree of the lower court, per Mr. Justice Sutherland, at p. 483, says:

"That the Shipping Act covers the dominant facts alleged in the present case as constituting a violation of the Antitrust Act is clear \* \* \* [485]. A comparison of the enumeration of wrongs charged in the bill with the provisions of the sections of the Shipping Act above outlined conclusively shows, without going into detail, that the allegations either constitute direct

and basic charges of violations of these provisions or are so interrelated with such charges as to be in effect a component part of them; and the remedy is that afforded by the Shipping Act, which to that extent supersedes the antitrust laws. Compare *Keogh v. Chicago & N. W. Ry. Co., supra* [260 U. S. 162]. The matter, therefore, is within the exclusive preliminary jurisdiction of the Shipping Board. The scope and evident purpose of the Shipping Act, as in the case of the Interstate Commerce Act, are demonstrative of this conclusion. Indeed, if there be a difference, the conclusion as to the first named act rests upon stronger ground, since the decisions of this court compelling a preliminary resort to the commission were made in the face of a clause in § 22 of the Interstate Commerce Act, that nothing therein contained should in any way abridge or alter existing common law or statutory remedies, but that the provisions of the act were in addition to such remedies (*Mitchell Coal Co. v. Pennsylvania R. Co.*, 230 U. S. 247, 256); a clause that finds no counterpart in the Shipping Act."

No purpose will be served in burdening this Court with a lengthy analysis of all of the decisions on this point tabulated above, in view of the overwhelming weight of the reasoning supporting the great chain of decisions.

In *Myers v. Bethlehem Shipbuilding Corp.*, 303 U. S. 41, the Court, in directing the dismissal of a bill in equity to enjoin the National Labor Relations Board, because of the supreme and exclusive jurisdiction of said Board, per Mr. Justice Brandeis, at p. 48, says:

"Second. The District Court is without jurisdiction to enjoin hearings because the power 'to prevent any person from engaging in any unfair practice affecting commerce,' has been vested by Congress in the Board and the Circuit Court of Appeals, and Congress has declared: 'This power shall be exclusive, and shall not be affected by any other means of adjustment or prevention that has been or may be established

by agreement, code, law, or otherwise.' The grant of that exclusive power is constitutional, because the Act provided for appropriate procedure before the Board and in the review by the Circuit Court of Appeals an adequate opportunity to secure judicial protection against possible illegal action on the part of the Board. No power to enforce an order is conferred upon the Board. To secure enforcement, the Board must apply to a Circuit Court of Appeals for its affirmance. And until the Board's order has been affirmed by the appropriate Circuit Court of Appeals, no penalty accrues for disobeying it. The independent right to apply to a Circuit Court of Appeals to have an order set aside is conferred upon any party aggrieved by the proceeding before the Board. The Board is even without power to enforce obedience to its subpoena to testify or to produce written evidence. To enforce obedience it must apply to a District Court; and to such an application appropriate defence may be made.

"As was said in *National Labor Relations Board v. Jones & Laughlin Steel Corp.*, 301 U. S. 1, 46, 47, the procedural provisions, 'do not offend against the constitutional requirements governing the creation and action of administrative bodies. See *Interstate Commerce Commission v. Louisville & Nashville R. Co.*, 227 U. S. 88, 91. The Act establishes standards to which the Board must conform. There must be complaint, notice and hearing. The Board must receive evidence and make findings. The findings as to the facts are to be conclusive, but only if supported by evidence. The order of the Board is subject to review by the designated court, and only when sustained by the court may the order be enforced. Upon that review all questions of the jurisdiction of the Board and the regularity of its proceedings, all questions of constitutional right or statutory authority, are open to examination by the court. We construe the procedural provisions as affording adequate opportunity to secure judicial protection against arbitrary action in accordance with the well-settled rules applicable to administrative agencies set up by Congress to aid in the enforcement of valid legislation.'

"It is true that the Board has jurisdiction only if the complaint concerns interstate or foreign commerce. Unless the Board finds that it does, the complaint must be dismissed. And if it finds that interstate or foreign commerce is involved, but the Circuit Court of Appeals concludes that such finding was without adequate evidence to support it, or otherwise contrary to law, the Board's petition to enforce it will be dismissed, or the employer's petition to have it set aside will be granted. Since the procedure before the Board is appropriate and the judicial review so provided is adequate, Congress had power to vest exclusive jurisdiction in the Board and the Circuit Court of Appeals. *Anniston Manufacturing Co. v. Davis*, 301 U. S. 337, 343-346."

See to the same effect, *Anniston Mfg. Co. v. Davis*, 301 U. S. 337, 343, sustaining the right to recover refunds of processing taxes paid under the Agricultural Adjustment Act of 1933, which provision as to processing taxes this Court held unconstitutional in *United States v. Butler*, 297 U. S. 1.

It is not the function or province of a court to absorb administrative or executive functions to itself; for "The judicial function is exhausted when there is found to be a rational basis for the conclusions approved by the administrative body." (*Mississippi Valley Barge Line Co. v. United States*, 292 U. S. 282, 286, and cases there cited; *Rochester Telephone Corp. v. United States*, 307 U. S. 125.)

A succinct reason for affirmance of the judgment appealed from by the Government is the statement in *Stafford v. Wallace*, 258 U. S. 495, at 520:

"If Congress could provide for punishment or restraint of such conspiracies after their formation, through the Antitrust Law, as in the *Swift Case*, certainly it may provide regulations to prevent their formation."

The steadfast adherence to the doctrine that, where jurisdiction in the first instance is in the executive officer or administrative agency, no initial judicial power (in the courts) exists, is a clear demonstration that the separation of the three departments, viz., executive, legislative and judicial, forbids a partnership between, or joint exercise of jurisdiction by, any one of such departments with another.

In 1890, when the Sherman Antitrust Act was adopted, Congress had not yet provided a labyrinthian system of administrative agencies. As we have pointed out, the *Abilene* case made clear that matters within the jurisdiction of the Interstate Commerce Commission carved from initial judicial power of the lower federal courts any and all initial judicial power.

The consideration of this question does not involve the body of decisions relating to attack on administrative orders, or review of such orders, or the enforcement of such orders, by the machinery inhering in the judicial system, that is, in the courts. Necessarily administrative or executive orders must be within the jurisdiction of the executive officer or the administrative body; and such orders can not violate definitive legislation of Congress or override the Constitution.

To revert to the narrow question of carving initial judicial power from the courts until the executive officer or administrative tribunal has first exercised their exclusive jurisdiction over the subject matter, we come to the list of parallel instances wherein, with the growth of administrative bodies, this court has never departed from the doctrine that initial judicial power is carved from the jurisdiction of the lower courts in every instance of administrative or executive control, except as to matters wherein the statute creating the executive or administra-

tive jurisdiction expressly provides that initial judicial power of the courts shall remain and that a remedy may be applied in the alternative, that is, by both the courts and the executive or administrative agency. But no such alternative initial jurisdiction appears in any of the Agricultural Acts.

Since the Sherman Act, the sequence of withdrawal of applicability to agricultural commodities, including milk, from initial judicial power is shown by

1. Capper-Volstead Act, particularly section 2 thereof, which commits to the Secretary of Agriculture the power of regulation and visitation.
2. Cooperative Marketing Act of July 2, 1926 (U. S. C. Tit. 7, sec. 455),—showing the creation of the Farm Credit Administration in the Department of Agriculture, the Government acting as a clearing house for cooperatives.
3. Agricultural Adjustment Act of May 12, 1933, known as A. A. A. (U. S. C. Tit. 7, sec. 601, *et seq.*)
4. Amendment Agricultural Adjustment Act on August 24, 1935 (49 Stat. 750).
5. Agricultural Marketing Agreement Act of June 3, 1937 (U. S. C. Tit. 7, sec. 601, *et seq.*; Ch. 296, 50 Stat. 246).

Of these acts, only the production, control and processing tax provisions of the 1933 Agricultural Adjustment Act were held invalid in *United States v. Butler*, 297 U. S. 1. Accordingly, the 1935 amendment of the 1933 act was designed to correct doubts as to the marketing provisions. Congress, by the 1937 Agricultural Marketing Agreement Act, reenacted, confirmed and validated without substantial change the provisions of the 1933 Agricultural Act as amended in 1935, relating to marketing agreements and orders. This court sustained the validity of the 1937 Agricultural Marketing Agreement Act in *United States*

v. *Rock Royal Co-Operative, Inc.*, ... U. S. ... (59 S. Ct. 993) and *H. P. Hood & Sons, Inc. v. United States, et al.*, ... U. S. ... (59 S. Ct. 993), opinions wherein were rendered on June 5, 1939.

The effect of the holdings in the *Rock Royal Co-Operatives* and *H. P. Hood & Sons* case, is to validate all provisions of the 1933 act and 1935 amendment thereof, relating to marketing agreements and orders, for such provisions were substantially reenacted in the 1937 Agricultural Marketing Agreement Act.

The holding in the *Abilene* case has been applied by this court to the initial executive or administrative agencies listed chronologically below, by year the particular statute was enacted, though the decisions have been listed chronologically, *infra*, without allocation to the particular administrative agency:

- (a) Interstate Commerce Commission, in 1910.
- (b) Federal Trade Commission, in 1914.
- (c) United States Shipping Board, in 1916.
- (d) District of Columbia Rent Commission, in 1919.
- (e) Secretary of Agriculture: Packers and Stockyards Act of 1921.
- (f) Board of Tax Appeals, 1926.

In addition to this course of decision by this court, as to the particular administrative agencies, we have the following, among other, additional legislation enacted in the light of said course of decision:

- 1920. Federal Power Commission Act of June 10, 1920; ch. 285, sec. 20, 41 Stat. L. 1063; U. S. C. Tit. 16, sec. 813.
- 1922. Grain Futures Commission, 42 Stat. L. 998, 1002; U. S. C. Tit. 7, secs. 9, 10.

- 1927. Federal Radio Act (U. S. C. A. Tit. 47, sec. 15 and editorial note).
- 1934. Federal Communications Commission (U. S. C. Tit. 47, sec. 303).
- 1934. Securities and Exchange Commission (U. S. C. Tit. 15, sec. 78d).
- 1935. Federal Labor Board (U. S. C. Tit. 29, sec. 151).
- 1937. Bituminous Coal Commission (U. S. C. Tit. 15, sec. 828).

Mr. Justice Brandeis, in *United States v. Griffin*, 303 U. S. 226, in reviewing the growth of administrative bodies, at p. 235, says:

"In recent years the field of administrative determination has been widely extended; and the duty of making many of these determinations has been imposed upon the Interstate Commerce Commission. Some of the statutes contain specific provision making applicable jurisdiction under the Urgent Deficiencies Act. This is true of the Emergency Railroad Transportation Act of 1933, 48 Stat. 211, 216, as amended, 49 Stat. 376, and of the Motor Carrier Act of 1935, 49 Stat. 543, 550. Compare Transportation of Explosives Act (Criminal Code, § 233), 35 Stat. 554, 555, as amended, 35 Stat. 1088, 1135, 41 Stat. 1445. It is true likewise of several statutes under which the determinations are to be made by other administrative tribunals. Shipping Act of 1916, 39 Stat. 728, 738, superseded by 49 Stat. 1985 (United States Shipping Board); Packers & Stockyards Act of 1921, 42 Stat. 159, 168 (Secretary of Agriculture); Perishable Agricultural Commodities Act of 1930, 46 Stat. 531, 535 (Secretary of Agriculture); Emergency Railroad Transportation Act of 1933, *supra* (Federal Coordinator of Transportation); Communications Act of 1934, 48 Stat. 1064, 1093, as amended, 50 Stat. 189 (Federal Communications Commission). The orders for which review is provided by each of these statutes are like the orders under the Interstate Commerce Act fixing rates payable by shippers. Im-

proper injunctive relief of such orders or delay in final determination of their validity may seriously affect the public interest by preventing or obstructing action under those statutes."

Parenthetically, it should be noted that the learned justice appended in his footnote 7, an additional exposition of *instances of administrative growth*.

To make our position clear, it is not our purpose to attack New Deal legislation and the policy of such legislation in enlarging executive or administrative jurisdiction and removing or carving away the subject matter thereof from initial judicial control. If anything, it is the Antitrust Division that is attacking the New Deal philosophy, in attempting to nullify the supreme, exclusive and plenary executive jurisdiction of the Secretary of Agriculture over agricultural commodities and milk. For that exclusive jurisdiction, Congress has appropriated billions of dollars.

It is unnecessary to review the various subject matters placed under administrative jurisdiction in the last decade. Obviously, the sustaining of the Government's contention in the present case would carry with it a train of disaster, resulting in a virtual collapse of government. If it were to be inscribed into the body of federal law that all executive and administrative jurisdiction is frail and transitory and subject to concurrent jurisdiction of the federal courts, the chaos resulting to the business structure of this nation becomes at once apparent.

Let it be known that a citizen obeys an executive or administrative order at his peril, and what becomes of the executive power! Under such circumstances will the citizen obey any executive or administrative order if obedience spells indictment? Where, in our constitutional system, can there be found any authority for compelling

a citizen to act pursuant to executive authority and, after such compulsion, subjecting the obedient citizen to the hazard of criminal prosecution? We solemnly submit that the reversal of the judgment appealed from would be the declaration of the staggering doctrine that legislative and executive power no longer exist and that the three sovereign departments of government are no longer separate entities.

The stated policy of the several Agricultural Acts is that each thereof was enacted to remedy conditions brought about by the economic depression. These Agricultural Acts are part of a fabric of legislation designed to alleviate trade and commerce because of the worldwide economic situation. The underlying philosophy is that the economic needs of the nation and its citizens can best be served by the national policy now established by Congress, that the philosophy of individualism and unrestricted competition must give way to collectivism, co-operation and control of harmful competition. As this Court has repeatedly stated, it is not concerned with the wisdom of legislation, if it be within constitutional powers.

To sustain the theory of the Department of Justice would be to overrule the decisions of this Honorable Court in the *Rock Royal, Inc.* case and the *Hood* case; and in fact, the entire code of decisions relating to the powers of Congress to delegate to executive officers and administrative tribunals jurisdiction of defined subject matter and remove such jurisdiction from initial judicial power. It calls for no argument at this late date to demonstrate that this Court will not substitute its opinion as to the wisdom of legislation for that of the wisdom of Congress in enacting a particular statute.

The Secretary of Agriculture, under the several Agri-

cultural Acts, had ample jurisdiction and power, by regulations, hearings, orders, etc., to restrain the formation of any alleged conspiracy as is attempted to be set forth in the several counts of the indictment in the instant case, and to invoke the aid of the courts to enforce such orders. The decisions are legion that resort to administrative remedies may be made a condition precedent to a judicial hearing (*Northern P. R. Co. v. Solum*, 247 U. S. 477, 483; *First Nat. Bank v. Weld County*, 264 U. S. 450, 454; *United States Nav. Co. v. Cunard SS Co.*, 284 U. S. 474); and this is so even though the party is asserting deprivation of rights secured by the Federal Constitution (*First Nat. Bank v. Weld County*, 264 U. S. 450).

As we shall demonstrate in division III of the argument, several provisions of the Agricultural Acts, particularly in the Agricultural Marketing Agreement Act of 1937, specifically provide for action by the Secretary of Agriculture, or claim made on a hearing before the Secretary of Agriculture, as a condition precedent to invocation of judicial power.

### C. Congress has plenary legislative power to abolish the lower federal courts and to enlarge or limit the jurisdiction of such courts.

In *Kline v. Burke Constr. Co.*, 260 U. S. 226, the Court, in holding that the right of a citizen to prosecute his case against a citizen of another state in a federal court is not a right granted by the constitution, at p. 234, says:

"Only the jurisdiction of the Supreme Court is derived directly from the Constitution. Every other court created by the general government derives its jurisdiction wholly from the authority of Congress. That body may give, withhold or restrict such jurisdiction at its discretion, provided it be not extended beyond the boundaries fixed by the Constitution.

*Turner v. Bank of North America*, 4 Dall. 8, 10; *United States v. Hudson & Goodwin*, 7 Cranch, 32; *Sheldon v. Sill*, 8 How. 441, 448; *Stevenson v. Fain*, 195 U. S. 165. The Constitution simply gives to the inferior courts the capacity to take jurisdiction in the enumerated cases, but it requires an act of Congress to confer it. *The Mayor v. Cooper*, 6 Wall. 247, 252. And the jurisdiction having been conferred may, at the will of Congress, be taken away in whole or in part; and if withdrawn without a saving clause all pending cases though cognizable when commenced must fall. *The Assessors v. Osbornes*, 9 Wall. 567, 575."

See also *Sheldon v. Sill*, 8 How. 441, 448.

The situation presented by the enactment of the several Agricultural Acts, beginning with the original Agricultural Adjustment Act of 1933, is comparable to that of the amendment or partial repeal of an earlier statute in conflict therewith, viz., said Agricultural Acts, in fact, did amend or partially repeal the provisions of the acts, as amended, defining the jurisdiction of the district courts so as to carve therefrom jurisdiction over agricultural commodities, including milk, devolved by said Agricultural Acts upon the Secretary of Agriculture.

In *Ex parte McCordle*, 7 Wall. 506, where the Act of March, 1868, took away the jurisdiction defined by the Act of 1867, of this Court, in cases of *habeas corpus*, this Court, in holding that it no longer had jurisdiction of the appeal, at p. 514, says:

"We are not at liberty to inquire into the motives of the legislature. We can only examine into its power under the Constitution; and the power to make exceptions to the appellate jurisdiction of this court is given by express words.

"What, then, is the effect of the repealing act upon the case before us? We cannot doubt as to this. Without jurisdiction the court cannot pro-

ceed at all in any cause. Jurisdiction is power to declare the law, and when it ceases to exist, the only function remaining to the court is that of announcing the fact and dismissing the cause. And this is not less clear upon authority than upon principle."

So it is that in 1892, this Court, in a *habeas corpus* case arising under the Chinese Exclusion Act, *Fong Yue Ting v. United States*, 149 U. S. 698, in pointing out that the lower federal courts are courts of limited jurisdiction but that within their scope of jurisdiction their judicial power is plenary and that Congress may remove from the scope of controversies within judicial power, *i. e.*, carve from the Act conferring jurisdiction, and place certain controversies beyond the cognizance of the courts of the United States, at page 714, says:

"So claims to recover back duties illegally exacted on imports may, if Congress so provides, be finally determined by the Secretary of the Treasury. *Cary v. Curtis*, 3 How. 236; *Curtis v. Fidler*, 2 Black, 461, 478, 479; *Arson v. Murphy*, 109 U. S. 238, 240. But Congress may, as it did for long periods, permit them to be tried by suit against the collector of customs. Or it may, as by the existing statutes, provide for their determination by a board of general appraisers, and allow the decisions of that board to be reviewed by the courts in such particulars only as may be prescribed by law. Act of June 10, 1890, c. 407, §§ 14, 15, 25, 26 Stat. 137, 138, 141; *In re Fassett*, 142 U. S. 479, 486, 487; *Passavant v. United States*, 148 U. S. 214.

"To repeat the careful and weighty words uttered by Mr. Justice Curtis, in delivering a unanimous judgment of this court upon the question what is due process of law: 'To avoid misconstruction upon so grave a subject, we think it proper to state that we do not consider Congress can either withdraw from judicial cognizance any

matter which, from its nature, is the subject of a suit at the common law, or in equity, or admiralty; nor, on the other hand, can it bring under the judicial power a matter which, from its nature, is not a subject for judicial determination. At the same time, there are matters, involving public rights, which may be presented in such form that the judicial power is capable of acting on them, and which are susceptible of judicial determination, but which Congress may or may not bring within the cognizance of the courts of the United States, as it may deem proper.' *Murray v. Hoboken Co.*, 18 How. 272, 284."

It is this theory that furnishes the basis for the doctrine of the *Abilene Cotton Oil Co.* case and the lengthy chain of decisions founded thereon.

We respectfully submit that no construction or application of the Sherman Act was made by the district court, and that the demurrer can not stand as a plea in bar for the several reasons presented in the Wanzer Group Statement in Opposition (see motion to dismiss of Wanzer group and not restated in this brief); wherefore this appeal should be dismissed for want of jurisdiction.

D. Whether the opinion of the district court as to the exclusive jurisdiction of the Secretary of Agriculture be correct or not is immaterial; for, upon the government's own theory of conflict of jurisdiction as between the district court and the Secretary of Agriculture, said executive officer having, by affirmative action, exercised jurisdiction over the Appellees under License 30 for the Chicago Milk Marketing Area during January and February and up to March 2, 1935, and as the jurisdiction of the district court was not invoked until the return of the indictment in 1938, the rule of comity, applicable to such conflicts of jurisdiction, precludes a direct appeal to the Supreme Court under the settled course of decision.

We have seen the almost innumerable decisions of the Supreme Court that Congress may carve from the initial judicial power of the lower federal courts and devolve jurisdiction over the carved subject matter upon an executive officer or administrative tribunal. *The vesting of jurisdiction in the Secretary of Agriculture and the actual exercise by said executive office, of his exclusive administrative jurisdiction in the Chicago Milk Marketing Area, under License 30, in January, February, and up to March 2, 1935*—bearing in mind that the jurisdiction of the district court was not invoked until the return of the indictment herein in November, 1938—created a situation comparable to the dismissal of a suit in the federal court, as in *Harkin v. Brundage*, 276 U. S. 36, because of an arrest of property in a prior suit in a state court, involving the same subject matter.

In the *Harkin v. Brundage* case, a creditor's bill was filed in the federal court and a stockholders' suit in the state court, but the test was the substantial identity of the subject matter, although there were differences in

procedure in the respective suits. *Harkin v. Brundage* did, in fact, come up from the Circuit Court of Appeals and, under the settled doctrine\* of this Court, as stated by Chief Justice White in *Railroad Commission v. Louisville & N. R. Co.*, 225 U. S. 272, 279.

Thus there is no jurisdictional question under section 238 of the Judicial Code (U.S.C., Tit. 28, Sec. 345), even if this were treated as a civil instead of a criminal case, to authorize a direct appeal to this court in the instant case. And, in this connection, observe that section 238 of the Judicial Code does not enlarge upon the instances wherein, in criminal cases, direct appeals may be taken by the Government to the Supreme Court.

Under the Criminal Appeals Act, the "exceptional right to review in favor of the United States" (*United States v. Keitel*, 211 U. S. 370, 399) is "an innovation in criminal jurisdiction in certain classes of prosecutions, it cannot be extended beyond its terms." (*United States v. Dickenson*, 213 U. S. 92, 103.)

The Secretary of Agriculture, having stepped into the Chicago Milk Marketing Area prior to January, 1935, the date set in the indictment as the commencement of the conspiracy, and said executive having continued to exercise his exclusive executive authority within the Chicago Milk Shed up to March 2, 1935, and as no provision appears in the Agricultural Acts since that time, authorizing the Secretary of Agriculture to abdicate the mandatory

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\* "That it is also true as to the position of the appellees, is demonstrated by observing that it has long been settled that a mere conflict between courts, concerning the right to adjudicate upon a particular subject matter growing out of a priority of jurisdiction in another forum, involves a question of comity which there would be no right to consider if the direct appeal involved solely a question of jurisdiction. *Courtney v. Pradt*, 196 U. S. 89, 91, and cases cited."

statutory duties devolved upon him, it must be assumed that, from March 2, 1935, up to the date of the return of the indictment in November, 1938, the Secretary of Agriculture had the potential power to control the Chicago Market (cf. *Harkin v. Brundage*, 276 U. S. 36).

In cases of conflict of jurisdiction, the court first acquiring jurisdiction of the *res* and having the present potential power to grant a remedy, retains such jurisdiction as a bar to a subsequent suit affecting the same *res*, where the remedy, i. e., receiver, is actually obtained prior to application therefor in the earlier suit under which a potential power to obtain the appointment of a receiver existed (See *Harkin v. Brundage*, 276 U. S. 36).

The mere fact that, since the Agricultural Acts, the Secretary of Agriculture is an administrative tribunal over controversies involving agricultural commodities, including milk, does not remove this case from the theory of conflict of jurisdiction, relied upon by the Government, because the Government's own theory assumes and, indeed, admits, a conflict of jurisdiction between the Secretary of Agriculture on the one hand, and the district court on the other.

We submit that we have demonstrated that, in the light of the settled doctrine of this Court that no direct appeal to this Court would lie in a case of an order involving a mere conflict of jurisdiction, the appeal from the judgment in this case should be dismissed, whether or not the Government be correct in its argument on the merits.

With these preliminary observations in mind, let us proceed to reply to the several subdivisions of the Government's argument under division II of its brief.

## II.

The Wanzer Group Appellees do not contend that anything has been withdrawn from the Sherman Act, but that initial judicial power of the district courts as to agreements, combinations or conspiracies relating to the subject matter devolved upon the Secretary of Agriculture, has been carved away or rescinded.

In view of the carving of initial judicial power of the district courts, the provisions of the Sherman Act, if applied to combinations as to agricultural products, including milk—a plain case of definition and creation of an alleged crime without any jurisdiction in a district court to try an indictment thereunder, as guaranteed by the Fifth and Sixth Amendments of the Constitution of the United States—presents a question not involved on this appeal and expressly excluded by the finding of the district judge in the portion of his opinion quoted at p. 6, *infra*, wherein the district court makes a specific finding that the holding on Counts 1, 2 and 4 is based entirely upon the carving of initial judicial power of the district court, itself, because of the several Agricultural Acts, conferring exclusive, supreme and plenary jurisdiction of the subject matter.

Stated simply, the carving of initial judicial power of the district courts over a subject matter devolved upon exclusive executive and administrative jurisdiction, has left the Sherman Act in a condition wherein it may include alleged conspiracies affecting milk, but without any practical effect because the district courts have been deprived of initial jurisdiction over such conspiracies—presenting a spectacle of an alleged crime on the statute books, but no court to try an indictment therefor.

**A. As to the Government's contention that agricultural commodities are within the purview of the Sherman Act.**

We respectfully submit that we have demonstrated that the Government's contention in this regard is without substance.

**B. As to the Government's contention that immunity from application of the Sherman Act cannot be implied but must be expressly granted.**

We do not contend for immunity from the Sherman Act, but that the Agricultural Acts, commencing with the Agricultural Adjustment Act of 1933, carved from the initial judicial power of the district court any initial jurisdiction over the subject matter, viz., agricultural commodities, including milk, and those engaged in the production and marketing thereof.

To support its theory of exemptions from statutes, the government cites three cases:

*U. S. v. Barnes*, 222 U. S. 513, 520.

*Keokuk Ry. v. Missouri*, 152 U. S. 306.

*Frost & Wenig*, 157 U. S. 46.

Let us analyze those decisions.

In *United States v. Barnes*, 222 U. S. 513, the court, in holding that subsequent legislation upon the general subject of oleomargarine taxes, covered by a code or systematic collection of general rules dealing with said subject in a comprehensive way carries with it an implication that the general rules are not superseded, save as the contrary clearly appears, at page 521 says:

"We conclude that, while the express extension of particular sections in chapter 3, dealing with special taxes, to the like taxes imposed by §3 of the Oleo-

margarine Act may operate as an implied exclusion of the other sections in that chapter, it does not in any wise restrict or affect the operation of any of the general sections in chapters 1 and 2. And as § 3177 is a part of chapter 2, is general in its terms, and does not appear to be repugnant to any provision in the Oleomargarine Act, we think the question first above stated must be answered in the affirmative."

But the Agricultural Acts do not relate to the same code of legislation viz. Monopolies, etc., as that which covers the Sherman Act. The Agricultural Acts are remedial; and the Sherman Act is penal, wherefore the said statutes are not *in pari materia*, let alone, part of the same code of regulations relating to the penal act, viz. Sherman Act.

Indeed the *Barnes* case is authority for the doctrine that rules of statutory construction do not obtain unless there be ambiguity. Certainly no ambiguity exists either in the Sherman Act or in the Agricultural Acts. As well stated in *Russell Motor Car Co. v. United States*, 261 U. S. 514, at page 519:

"Rules of statutory construction are to be invoked as aids to the ascertainment of the meaning or application of words otherwise obscure or doubtful. They have no place as this court has many times held, except in the domain of ambiguity. (*Hamilton v. Rathbone*, 175 U. S. 414, 421; *United States v. Barnes*, 222 U. S. 513, 518, 519.)"

The entire philosophy of the Agricultural Acts is the exact opposite of that underlying the Sherman Act. The two systems of philosophy are diametrically opposed to each other.

In *Frost v. Wenie*, 157 U. S. 46, the court held that a later statute affecting trust lands of the Osage Indians could not repeal an earlier statute vesting rights in the Indians, since such repeal would work an impairment of

the rights guaranteed to the Indians by the treaty of 1865. Manifestly a statute violative of a treaty is unconstitutional. But this Honorable Court has expressly held in the *Rock Royal Cooperative* case that the Agricultural Acts were constitutional laws and that the executive and administrative jurisdiction vested and devolved thereby in and upon the Secretary of Agriculture were constitutional and valid.

In *Keokuk Ry. Co. v. Missouri*, 152 U. S. 301, Mr. Justice Brown says (304):

"The question in this case is whether the defendant, the Keokuk & Western Railroad Company, was entitled to the exemption of its property from taxation contained in the original charter to the Alexandria & Bloomfield Railroad Company, of which road it is the successor in interest."

All that the *Keokuk* case holds is that the dissolution of a corporation after an intervening change of the Constitution of Missouri of 1865 (prohibiting the legislature to exempt property from taxation) and the creation of a new corporation to be successor in interest of the dissolved corporation did not operate to confer upon the new corporation the exemption from taxation possessed by the old corporation.

We are not contending that the Agricultural Acts overruled or transgressed the Constitution of the United States. The Agricultural Marketing Agreement Act of 1937 (reenacting the provisions of the 1933 A. A. A. as amended in 1935) was held to be constitutional in *United States v. Rock Royal*, .... U. S. ....

To revert to the *Keokuk Ry Co.* case, at page 310:

"It follows from this that when the new corporation came into existence, it came precisely as if it had been organized under a charter granted at the

date of the consolidation, and *subject to the constitutional provisions* then existing, which required (Art. 11, sec. 16) that no property, real or personal, should be exempted from taxation, except such as was used exclusively for public purposes; in other words that the exemption from taxation contained in section 9 of the original charter of the Alexandria & Bloomfield Railway Company did not pass to the Missouri, Iowa & Nebraska Company."

By analogy, the Agricultural Acts held to be constitutional in the *Rock Royal* and *H. P. Hood Co.* cases in providing for a complete and exclusive executive and administrative jurisdiction in the Secretary of Agriculture over agricultural commodities, including milk, and those engaged in the production, handling and marketing thereof, operated to carve from the scope of controversies within the initial judicial power of the district courts (mere creatures of Congress) any and all initial jurisdiction of the subject matter devolved upon exclusive executive and administrative jurisdiction.

In another view of the government's theory, its very reliance upon the effect of the Agricultural Acts as working, or failing to work, exemptions from the Sherman Act is an admission of record by the government that it is seeking a construction of the Agricultural Acts upon which the indictment is *not* founded, wherefore, the judgment on demurrer is not reviewable (see Motion to Dismiss, and Statement Opposing Jurisdiction filed by Wanzer Group). It necessarily follows that the government itself has demonstrated that the appeal should be dismissed.

The Government embarks upon a lengthy argument, not supported by citation of authority, to sustain its major premise that the Agricultural Acts did not exclude agricultural commodities and those engaged in the pro-

duction, handling and marketing thereof from the purview of the Sherman Act. In short, the Government's theory is that the sole and only purpose of the Agricultural Acts was to authorize the farmers to enter into marketing agreements. A sufficient answer is that farmers were authorized to form cooperatives by the Capper-Volstead Act and the Co-operative Marketing Act. What, then, would have been the purpose of Congress to enact the Agricultural Adjustment Act of 1933, the amendment thereof in 1935, and the Agricultural Marketing Agreement Act of 1937, if it were intended merely to restate the provisions of the Capper-Volstead Act?

The *Appalachian Coal Company* case is wholly inapplicable. The very holding of this Honorable Court, in the *Rock Royal* and *Hood* cases, that the Secretary of Agriculture was vested with executive and administrative jurisdiction over agricultural commodities, including milk and the producers and distributors thereof, is a final and conclusive determination that the Government's theory is wholly untenable. But here, again, we beg to remind the Court that, throughout the course of its brief, the Government has studiously avoided answering the question of carving from the initial judicial power of district courts the subject matter of agricultural commodities and those engaged in the production, handling and marketing thereof.

Obviously, the question of implied repeal or repugnancy, as between the Agricultural Acts and the Sherman Act, is beside the point, except that the very policy of the Agricultural Acts, as we shall later show, is utterly repugnant, and no greater example of repugnancy can be imagined than that between the Agricultural Acts and the Sherman Act; and, if there be repugnancy, the authorities relied upon by the Government concede that the two statutes can not stand *in pari materia*.

The two Acts are repugnant, both in theory, philosophy and intent of Congress. The Sherman Act concerns itself with monopolies and punishment thereof; the Agricultural Acts, in the interest of alleviation of economic distress owing to the economic depression, encourage monopoly in agricultural commodities and, in fact, put the control of such commodities and the creation of such monopolies under the exclusive executive and administrative jurisdiction of the Secretary of Agriculture. Is the Government, then, to be permitted to compel citizens to become a part of a monopoly through its executive orders, and then, at the same time, indict them under the Sherman Act? Here, then, is the repugnancy.

To sustain its theory that conspiracies may be subject to prosecution under the Sherman Act without regard to the peculiar power of control and regulation which is vested in some administrative agency by another statute, Gov. brf., p. 63, cites the following decisions:

*United States v. Pacific & Arctic Ry. Co.*, 228 U. S. 87;

*United States v. Union Pacific R. R. Co.*, 226 U. S. 61;

*United States v. Joint Traffic Association*, 171 U. S. 505;

*United States v. Trans-Missouri Freight Association*, 166 U. S. 290.

Obviously, acquisition of the capital stock of a competing railroad, or agreements between railroads as to distribution of freight or passenger traffic, involved in the above four cases, presented an entirely different situation from that in the case at bar, especially in view of the course of amendment of the Interstate Commerce Commission legislation, and the construction of the Agricultural Marketing Agreement Act of 1937, which substantially re-enacts and confirms the provisions of the 1933 Agricultural

Adjustment Act, as amended in 1935, in the *Rock Royal Cooperative, Inc.* case.

In *Great Northern Railway Company v. Merchants Elevator Company*, 259 U. S. 285, Mr. Justice Brandeis, in delivering the unanimous opinion of the Court, holding that a preliminary resort to the Interstate Commerce Commission for its decision is not essential to support the jurisdiction of the courts over cases involving a disputed question of construction of an interstate tariff, where no fact, evidential or ultimate, is in controversy, at p. 295, says:

"If, in examining the cases referred to, there is borne in mind the distinction above discussed between controversies which involve only questions of law and those which involve issues essentially of fact or call for the exercise of administrative discretion, it will be found that the conflict described does not exist and that the decisions referred to are in harmony also with reason."

In support of that statement, the learned Justice, in footnote 2, presents a most elaborate review of the authorities, first as to those allowing invocation of judicial power without preliminary resort to the Commission, and secondly, those where the courts have refused to take jurisdiction because there had not been preliminary resort to the Commission and the question presented either was one of fact or called for the exercise of administrative discretion.

#### The four cases:

(*United States v. Pacific & Arctic Ry. Co.*, 228 U. S. 87;

*United States v. Union Pacific R. R. Co.*, 226 U. S. 61;

*United States v. Joint Traffic Association*, 171 U. S. 505;

*United States v. Trans-Missouri Freight Association*, 166 U. S. 290.)

relied upon by the Government do not involve discretionary fact-finding powers of the Interstate Commerce Commission, but involve pure constructions of questions of law; and observe that sections 8, 9 and 22 of the Interstate Commerce Acts expressly reserve jurisdiction in the courts on certain contingencies (U.S.C. Tit. 49, secs. 8, 9, 22).

As we shall presently demonstrate, the Agricultural Acts here involved contain no such provisions for optional or alternative remedy by recourse to the courts.

The powers of the several district courts of the United States, with reference to agricultural commodities and those engaged in the production and handling thereof, are specifically limited by U. S. C. Tit. 7, sec. 608a(6),(7). For convenience, we subjoin said sections:

"(6) The several district courts of the United States are hereby vested with jurisdiction specifically to enforce, and to prevent and restrain any person from violating any order, regulation, or agreement, heretofore or hereafter made or issued pursuant to this chapter, in any proceeding now pending or hereafter brought in said courts."

"(7) Upon the request of the Secretary of Agriculture, it shall be the duty of the several district attorneys of the United States, in their respective districts, under the directions of the Attorney General, to institute proceedings to enforce the remedies and to collect the forfeitures provided for in, or pursuant to, this chapter. Whenever the Secretary, or such officer or employee of the Department of Agriculture as he may designate for the purpose, has reason to believe that any handler has violated, or is violating, the provisions of any order or amendment thereto issued pursuant to this title the Secretary shall have power to institute an investigation and, after due notice to such handler, to conduct a hearing in order to determine the facts for the purpose of referring the matter to the Attorney General for appropriate action."

These two sections are decisive of the fact that initial judicial power of the several district courts of the United

States, with reference to agricultural commodities and those engaged in the production and handling thereof, was, in fact, carved from and that there is no concurrent jurisdiction existing between the district court and the Secretary of Agriculture.

The Act very specifically provides that the jurisdiction of the district courts must be invoked by the Secretary of Agriculture, himself, as is provided in U. S. C., Tit. 7, sec. 608a(7), and in no other manner. The condition precedent to invocation of the jurisdiction of the district court by the Secretary of Agriculture, himself, is specifically provided for in the two-fold provision of subsection 608a(7): First, by referring the matter to the district attorney, under the direction of the Attorney General; and, second, to refer the matter to the Attorney General for appropriate action.

Should the Secretary of Agriculture fail to invoke the jurisdiction of the district court in this manner, the district court would be powerless to act.

Nowhere in the indictment is it alleged that the Secretary of Agriculture ever had any hearings, issued any orders, made findings that there were violations of any of his orders, had requested the district attorney, under the direction of the Attorney General, to institute proceedings, or had referred the subject matter to the Attorney General for appropriate action.

The district court was correct in its conclusion that it did not have jurisdiction. There was therefore no justiciable controversy before the district court, and the appeal prosecuted by the Government from the judgment entered in the proceedings is an appeal from a non-justiciable subject matter.

Nothing set forth in Counts 1, 2 and 4 of the indictment

relates to a subject matter that does not involve a fact-finding question or an administrative question, solely within the exclusive and plenary executive jurisdiction of the Secretary of Agriculture.

In the recent case of *Rochester Telephone Corp. v. United States*, 307 U. S. 125, Mr. Justice Frankfurter, after an exhaustive review of the authorities as to collision of the judicial power and the jurisdiction of the Interstate Commerce Commission, at p. 139, says:

"From these general considerations, the Court evolved two specific doctrines, limiting judicial review of the orders of the Interstate Commerce Commission. One is the primary jurisdiction doctrine, firmly established in *Texas & P. R. Co. v. Abilene Cotton Oil Co.*, 204 U. S. 426. Thereby, matters which call for technical knowledge pertaining to transportation must first be passed upon by the Interstate Commerce Commission before a court can be invoked. The other is the doctrine of administrative finality. Even when resort to courts can be had to review a Commission's order, the range of issues open to review is narrow. Only questions affecting constitutional power, statutory authority, and the basic prerequisites of proof, can be raised. If these legal tests are satisfied, the Commission's order becomes uncontested. *Interstate Commerce Commission v. Illinois C. R. Co.*, 215 U. S. 452, 476; *Interstate Commerce Commission v. Union P. R. Co.*, 222 U. S. 541."

Bearing these considerations in mind, let us proceed to analyze the four authorities relied upon by the Government (Gov. Brf., p. 63) in support of its theory that the conspiracy charged, relating to a subject matter involving exclusive fact-finding and administrative power of the Secretary of Agriculture, has not been removed from initial judicial power of the District Court.

**1. United States v. Pacific & Arctic Ry. Co., 228 U. S. 87:**

This case came on writ of error to the District Court for Alaska to review to judgment sustaining demurrers to an indictment charging violations of the Antitrust and Interstate Commerce laws, wherein the district court held that the first five counts were fatally defective in that the conduct of the defendants was not subject to judicial review in a criminal or civil case until it had been submitted to and passed upon by the Interstate Commerce Commission.

The third, fourth and fifth counts were under the Interstate Commerce Laws and counts one and two were under the Antitrust Laws. This Court affirmed the holding of the District Court as to counts three, four and five, on the ground that exclusive administrative jurisdiction was in the Interstate Commerce Commission, but disagreed with the district court as to counts one and two under the Antitrust Laws, which said counts one and two contained no subject matter over which exclusive jurisdiction had been devolved upon the Interstate Commerce Commission. So that the utmost comfort that the Government may derive from that case is that the counts under the Sherman Act were joined with counts under the Interstate Commerce Laws and the counts under the Interstate Commerce Laws were held subject to demurrer because of invasion of the exclusive administrative jurisdiction of the Interstate Commerce Commission.

**2. United States v. Union Pacific R. R. Co., 226 U. S. 61:**

This case involved the purchase by the Union Pacific Railway Company of 46 per cent of the stock of the Southern Pacific Company, with the resulting control of the latter's railway system by the former.

The point of invasion of the jurisdiction of the Interstate Commerce Commission is not raised nor discussed, nor is it shown that any statute applicable to the Interstate Commerce Commission at the time of said case (which was decided in December, 1912), conferred upon the Interstate Commerce Commission any jurisdiction over the acquisition of stock of competing railroads.

### 3. **United States v. Joint Traffic Association, 171 U. S. 505:**

In this case, thirty-one railroad companies, engaged in transportation between Chicago and the Atlantic coast, formed an association by which they agreed that said association should have jurisdiction over competitive traffic, with certain exceptions. It was specifically agreed that the power so conferred upon the managers should be so construed and exercised as not to permit violation of the Interstate Commerce Act and that the managers should cooperate with the Interstate Commerce Commission to insure and obtain stability and uniformity in rates, fares and charges.

The alleged conspiracy related to matters collateral to the subject matter devolved upon the Interstate Commerce Commission as an administrative tribunal. But what has that situation to do with the case at bar, where the very subject matter set forth in Counts 1, 2 and 4, was under the supreme and exclusive control of the Secretary of Agriculture, since the Agricultural Adjustment Act of 1933, and at the very time the several conspiracies set forth in said counts are charged to have been formed, these Appellees were, in fact, operating and functioning under License 30 issued by the Secretary of Agriculture? Under said License 30, the Secretary of Agriculture had the sole, exclusive and plenary jurisdiction to pass upon the terms and conditions of handling,

producing and distributing of milk within the Chicago Milk Shed—a jurisdiction found by this Court, in the *Rock Royal Cooperative* case to be a valid investiture of jurisdiction, extending to this very day.

**4. United States v. Trans-Missouri Freight Association,  
166 U. S. 290:**

That case involved a freight association and is inapplicable for the several reasons last above stated. But observe the following language at p. 318, which gives answer to the lengthy excerpts from the Congressional Record appearing in the Government's brief in the instant case:

"All that can be determined from the debates and reports is that various members had various views, and we are left to determine the meaning of this act as we determine the meaning of other acts from the language used therein."

"There is, too, a general acquiescence in the doctrine that debates in Congress are not appropriate sources of information from which to discover the meaning of the language of a statute passed by that body. *United States v. Union Pacific Railroad Company*, 91 U. S. 72, 79; *Aldridge v. Williams*, 3 How. 9, 24, Taney, Chief Justice; *Mitchell v. Great Works Milling & Manufacturing Company*, 2 Story, 648, 653; *Queen v. Hertford College*, 3 Q. B. D. 693, 707.

"The reason is that it is impossible to determine with certainty what construction was put upon an act by the members of a legislative body that passed it by resorting to the speeches of individual members thereof. Those who did not speak may not have agreed with those who did; and those who spoke might differ from each other; the result being that the only proper way to construe a legislative act is from the language used in the act, and, upon occasion, by a resort to the history of the times when it was passed."

There is therefore no foundation for the statement, appearing at p. 63 of the Government's brief, "Although the Interstate Commerce Act embodies a remedial system that is complete and self-contained, the Sherman Act, in all of these cases, was held to apply, notwithstanding the jurisdiction of the Interstate Commerce Commission, on the theory that the Sherman Act and the Interstate Commerce Act are wholly independent of each other."

Observe that none of the Agricultural Acts since 1933 contain a provision such as section 22 of Title 49, U. S. C., conferring alternate or optional jurisdiction as between the Interstate Commerce Commission and the courts, as pointed out in *United States Navigation Co. v. Cunard S.S. Co.*, 284 U. S. 474, wherein the Court, in pointing out that the provisions of the Shipping Board Act were more stringent than those of the Sherman Act, at p. 485, says:

"The matter, therefore, is within the exclusive preliminary jurisdiction of the Shipping Board. The scope and evident purpose of the Shipping Act, as in the case of the Interstate Commerce Act, are demonstrative of this conclusion. Indeed, if there be a difference, the conclusion as to the first-named act rests upon stronger ground, since the decisions of this court compelling a preliminary resort to the commission were made in the face of a clause in § 22 of the Interstate Commerce Act, that nothing therein contained should in any way abridge or alter existing common law or statutory remedies, but that the provisions of the act were in addition to such remedies (*Mitchell Coal Co. v. Pennsylvania R. Co.*, 230 U. S. 247, 256); a clause that finds no counterpart in the Shipping Act."

**C. As to the Government's contention that none of the statutes enacted since the Sherman Act exempt agricultural products from the operation of said Sherman Act.**

The Government's plaint is that the district court, in its opinion, referred to a general policy of legislation affecting agriculture, and referred to section 17 of the Clayton Act, the Capper-Volstead Act, and the Cooperative Marketing Act.

The Appellees filing this brief are not agricultural associations, and are therefore excluded from the operation of said Acts; particularly as we did not contend in the lower court that jurisdiction over the handlers (distributors) was carved away from initial judicial power by any legislation other than the Agricultural Adjustment Act of 1933, as amended in 1935, and the Agricultural Marketing Agreement Act of 1937.

**D. As to the Government's contention that the Marketing Agreement Act, taken as a whole, does not exempt agricultural products from the operations of the Sherman Act.**

The theme of the Government's argument is that the view expressed in the opinion of the district court "ignores the limited purposes of the Marketing Agreement Act."

In support of that theory, the Government urges that the Constitution vests in Congress "complete and plenary power over interstate and foreign commerce." But the learned counsel for the Government overlooked the fact that Article III, Section 1, of the Constitution of the United States vests in Congress complete and plenary power to ordain and establish inferior courts.

At p. 24, *ante*, we respectfully submit that we have demonstrated that the district courts, being courts of special and limited jurisdiction, created by Congress, are subject to any limitation of classes of subject matter over which such courts may assert initial judicial power. Our contention is that Congress, in order to protect and advance interstate commerce, and to adopt measures to promote its growth, and to foster, protect, and control same, enacted the Agricultural Adjustment Act of 1933, the amendment thereto of 1935, and the Agricultural Marketing Agreement Act of 1937. In other words, the carving of initial judicial power, effected by such Agricultural Acts, was for the protection of interstate commerce. Wherefore the Government's argument in this connection begs the question submitted for review.

Parenthetically, it should be observed that the Government admits that "to some extent", these methods are inconsistent with the completely free competitive enterprise contemplated by the Sherman Act. To that extent, and to that extent alone, the Marketing Agreement Act provides that the Sherman Act shall not apply. Nothing in the Marketing Agreement Act sustains a broader exemption." That admission is made by the Government in the face of the plain provisions of the 1937 Agricultural Marketing Agreement Act, which re-enacted and confirmed the earlier provisions of the 1933 and 1935 Acts, which expressly gives power to the Secretary of Agriculture to institute investigations, conduct hearings and enter orders, independently of marketing agreements.

In any view of the Government's admission that some executive and administrative power is vested in the Secretary of Agriculture over the subject matter contained in the respective counts of the indictment, no jus-

ticiable controversy is presented because of the elementary fact that partnerships between the executive department and the judicial department do not comport with our Constitutional system. The extent of the interest of the partners to such a partnership and jurisdiction is immaterial for, if any substantial jurisdiction of a subject matter is in one department, all jurisdiction is removed from the other department.

**The declared policy of the Marketing Agreement Act is inconsistent with the policy of the Sherman Act.**

The Government quotes section 1 of the Marketing Agreement Act and follows same with the observation that (Gov. brf., p. 44) the condition sought to be met is a limited condition, affecting primarily the purchasing power of farmers:

We submit that the plain language of section 1, "and that these conditions affect transactions in agricultural commodities," in view of the innumerable references to handlers, as well as to producers, contained in the Act, precludes the narrow construction sought to be placed upon the Act merely because of the incidental use of the expression "impairs the purchasing power of farmers," in the light of a context, not only in said section 1, but throughout the lengthy provisions of the Act, that the sole purpose of the 1937 legislation was to concern itself with the purchasing power of farmers.

Similarly with the construction sought to be placed upon section 2 of the 1937 Act, wherein the Government's brief, p. 45, curiously states: "Congress limits that purpose by stating also its purpose to protect the interests of consumers by approaching the desired level of prices only gradually and by expressly stating that it authorizes

no action designed to maintain prices to farmers above the specified level." As to which the Government's brief concludes (p. 45): "Taken together, these purposes clearly limit the regulation authorized to action designed to increase the purchasing power of farmers by maintaining adequate prices for their products."

Does not that admission call for an affirmance of the judgment appealed from? Could there be a more specific demonstration that the entire subject matter of the indictment is within the exclusive jurisdiction of the Secretary of Agriculture because of the very reasons relied upon by the Government to exclude exclusive executive jurisdiction?

It was not necessary for Congress to have provided a complete substitute for the prevention "of all evils affecting interstate commerce in agricultural commodities, which might result from the combinations and conspiracies made illegal by the Sherman Act." The fact is, Congress acted; and that it did act within its Constitutional power (*Rock Royal* and *Hood* cases.)

With the wisdom of that legislation, the courts are not concerned. It may well be that Congress, at some future date, may amend the Agricultural Marketing Agreement Act of 1937, just as said 1937 Act is an amendment of the 1933 Act, as amended by the 1935 Act.

To support its theory, the Government's brief continues (p. 39): "The acts charged in the indictment were committed at a time when there was no marketing agreement or order in effect in the Chicago market" by which the Appellant seeks advantage from the fact that the Secretary of Agriculture, from and after his cancellation of License 30 for the Chicago Milk Marketing Area, on March 2, 1935, did not again take con-

trol of said Chicago Area until September 1, 1939; see Federal Register Marketing Order No. 41, Vol. 4, pages 3764-3768, 3770, of August 30, 1939, after the date of the judgment appealed from, and that, during the interregnum, the Secretary of Agriculture did not see fit to exercise the exclusive, mandatory executive jurisdiction devolved upon him by Congress—that, for that reason alone, such executive jurisdiction should be ignored.

The Government has not cited any cases in support of its theory that exclusive executive jurisdiction, vested by valid Act of Congress in an executive officer, may be ignored by such executive officer, with the effect of repealing the Act conferring such jurisdiction upon him. Appellees are not to blame for the nonfeasance of the Secretary of Agriculture, nor can such nonfeasance be made the basis of a rule of construction of the executive powers vested in such Secretary.

We submit the above observations because of our theory that the several Agricultural Marketing Agreement Acts cover a two-fold subject matter: (1) The duty of the Secretary of Agriculture to conduct investigations, hold hearings and enter orders; (2) the duty of the Secretary of Agriculture, separately considered, as to entering into, etc., of marketing agreements. Up to the date of the entry of the judgment herein (August 28, 1939), and since March 2, 1935, the Secretary of Agriculture saw fit not to exercise his jurisdiction to investigate, conduct hearings and enter orders with reference to the Chicago Milk Marketing Area throughout, as shown by the Federal Register, he did enter such orders in other milk marketing areas; and this Court may judicially notice that the Secretary of Agriculture, during that

period, exerted exclusive administrative control over some twenty milk marketing areas throughout the country.\*

The methods provided by the Agricultural Acts, beginning with 1933, for regulation of Interstate Commerce in agricultural commodities disclose a congressional intention to exempt agricultural products from the operation of the Sherman Act.

Under this subheading, the Government seeks to limit the executive jurisdiction of the Secretary of Agriculture to enter orders, to cases of a marketing agreement executed only after notice and a public hearing and that "no power is given to the Secretary to initiate a marketing agreement, nor can he force members of the industry to enter such an agreement." In support of that contention, the Government cites *United States v. Rock Royal*.

The Government, throughout its entire brief, has discussed the 1937 Agricultural Marketing Agreement Act as if it were the controlling law in existence during the month of January, 1935, affecting the subject matter of the indictment; but, as the respective counts of the indictment charge the formation of a conspiracy in the month of January, 1935, and that said conspiracy continued to the date of the return of the indictment, viz., November 1, 1938, the indictment period must be divided into three segments: The first segment beginning with the month of January, 1935 and continuing until the amendatory Act of

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\* See Fed. Reg. for March 8, 1939, for notice of hearing with reference to Kansas City Marketing Area; order sustaining operation of License for Milk in Fall River, Massachusetts Sales Area on April 23, 1936, Fed. Reg. Vol. 1, p. 264, and notice appearing with reference to said Fall River Area at p. 347 of the same volume, which references are typical of many to be found in the Federal Register in practically the identical language.

August, 1935; the second segment beginning with the amendatory Act of August, 1935, and continuing to the enactment of the Agricultural Marketing Agreement Act of June, 1935; and the third segment beginning with the enactment of the Agricultural Marketing Agreement Act of June, 1937, and continuing to the date of the return of the indictment, viz., November 1, 1938.

In January of 1935—the 1933 Act then controlling—the Secretary of Agriculture had in full force and effect in the Chicago Milk Marketing Area License No. 30, said license having been issued by the Secretary of Agriculture on May 31, 1934, effective June 1, 1934; amended June 30, 1934, effective July 1, 1934; amended July 17, 1934, effective July 18, 1934; amended August 21, 1934, effective August 22, 1934; amended October 30, 1934, effective November 1, 1934; amended December 1, 1934, effective December 2, 1934; and amended January 16, 1935, effective January 17, 1935. (It will be noted that the last mentioned amendment was the January of 1935 in which the indictment alleges the formation of the conspiracy which is herein involved (See Appendix A, p. 73).)

The Secretary of Agriculture imposed said License 30 and its amendments upon the Chicago Sales Area, without the consent of anyone affected thereby, pursuant to the provisions of section 8(3) of the Agricultural Adjustment Act of 1933, viz.:

"In order to effectuate the declared policy, the Secretary of Agriculture shall have power: \* \* \*

"(3) To issue licenses permitting processors, associations of producers, and others to engage in the handling in the current of interstate or foreign commerce of any agricultural commodity or product thereof, or any competing commodity or product

thereof. Such licenses shall be subject to such terms and conditions, not in conflict with existing acts of Congress or regulations pursuant thereto, as may be necessary to *eliminate unfair practices* or charges that prevent or tend to prevent the effectuation of the declared policy and the restoration of normal economic conditions in the marketing of such commodities or products and the financing thereof. \* \* \*

Observe the recital in the last above quoted excerpt: "unfair practices"—could there be a more specific demonstration that it was intended by Congress that the Secretary of Agriculture be vested with full and exclusive jurisdiction to prevent action or conduct within the Chicago Sales Area of a nature connoted with agreements, combinations or conspiracies affecting trade or commerce? What is a conspiracy within the purview of section 1 of the Sherman Act but a combination to engage in "unfair practices affecting interstate commerce"?

Nowhere in the provisions of the Agricultural Adjustment Act of 1933 can be found any restriction upon the exclusive, supreme and plenary jurisdiction of the Secretary of Agriculture administratively to restrain unfair practices, thus striking at the very root or source of formation of any agreement, combination or conspiracy involving unfair practices relating to agricultural commodities or products thereof.

Likewise will it be noted that the Secretary of Agriculture, under the 1933 Agricultural Adjustment Act, is not required to obtain the consent of producers or others engaged in the handling of agricultural commodities, as a condition precedent to his administrative jurisdiction to impose licenses which completely control processors, associations of producers, and those engaged in the handling, in the current of interstate or foreign commerce, of any agricultural commodity or product thereof. The license

was, in fact, an order, as the 1935 amendatory Act changes the term "license" to "order". So that this Honorable Court will note that License 30, with its array of amendments, really constitutes an executive or administrative order and the series of amendments to said order, all within the exclusive executive jurisdiction of the Secretary of Agriculture.

Thus is conclusively demonstrated that, at the very date set as the commencement of the conspiracy—a date, for purposes of demurrer, conclusive and binding upon the Government as distinguished from the effect of a date of judgment on trial of the merits—the exclusive jurisdiction of the Secretary of Agriculture not only existed as a supreme power but, on the said very date, the Secretary was actually exercising such exclusive and supreme jurisdiction. The indictment thus presents the anomalous and forbidden picture of a concurrent exercise of initial judicial power over a subject matter devolved by Congress to exclusive executive or administrative jurisdiction. This, of itself, is a complete answer to the contention of the Government that no power is given to the Secretary to initiate a marketing agreement; nor can he force members of the industry to enter into such an agreement. The entering into agreements is beside the point—that is only a portion of his jurisdictional powers. But note that section 8(2) of the Agricultural Adjustment Act of 1933 provides:

"In order to effectuate the declared policy, the Secretary of Agriculture shall have power: • • •

(2) To enter into marketing agreements with processors, associations of producers, and others engaged in the handling in the current of interstate or foreign commerce, of any agricultural commodity or product thereof, after due notice and opportunity for hearing to interested parties. • • •"

That section is complete authority for the Secretary of Agriculture even to initiate marketing agreements.

We shall proceed to demonstrate that the scope of the 1935 and the 1937 Acts is not limited to steps relating to voluntary marketing agreements, but reaches every step of executive jurisdiction over agricultural products, including milk. Numerous mandatory provisions appear, which require the entry of orders after hearing. There are likewise mandatory duty provisions which require the Secretary to initiate investigations into conditions affecting agricultural commodities, including milk, separate and apart from the cases involving voluntary marketing agreements.

Nowhere in the *Rock Royal* or in the *Hood* case did this Court, as we understand said decisions, announce any limitation of the authority and jurisdiction of the Secretary of Agriculture to instances of voluntary marketing agreements.

Section 608 of Title 7 of the U. S. Code, now part of the Agricultural Agreement Act, has substantially been in the same language since the 1933 Act. To quote same:

"(1). *Investigations: proclamation of findings.*  
Whenever the Secretary of Agriculture has reason to believe that:

(a) The current average farm price for any basic agricultural commodity is less than the fair exchange value thereof, or the average farm price of such commodity is likely to be less than the fair exchange value thereof for the period in which the production of such commodity during the current or next succeeding marketing year is normally marketed, and

(b) The conditions of and factors relating to the production, marketing, and consumption of such commodity are such that the exercise of any one or more of the powers conferred upon the

Secretary under subsections (2) and (3) of this section would tend to effectuate the declared policy of this chapter,

he shall cause an immediate investigation to be made to determine such facts. If, upon the basis of such investigation, the Secretary finds the existence of such facts, he shall proclaim such determination and shall exercise such one or more of the powers conferred upon him under subsections (2) and (3) of this section as he finds, upon the basis of an investigation, administratively practicable and best calculated to effectuate the declared policy of this chapter."

Nothing in that language indicates a limitation of the jurisdiction of the Secretary of Agriculture to passing upon voluntary marketing agreements.

Mr. Justice Reed, in reviewing the several sections of the 1937 Act, in the *Rock Royal* case, at p. . . . , says:

"Section 8a(6) gives jurisdiction to the District Courts of the United States to enforce, and to prevent and restrain any person from violating, any of the orders, regulations or agreements under its provisions."

In the light of the specific grant of executive power involved in the last quoted section, and the declaration of policy by Congress in each of said Acts, consider the provisions of sec. 610 of Tit. 7, particularly the language found in sec. (a), relating to the powers of the Secretary generally, as to the employment of clerks and the compensation, etc. Note in said sec. 610 the significant language:

"\* \* \* which the Secretary shall establish in the Department of Agriculture for the administration of the functions vested in him by this chapter."

Section 608c, par. (1), relating to orders, recites: "The Secretary of Agriculture shall \* \* \*—observe that the statute does not say "may," but specifically says "shall,"

meaning a mandatory duty—“\* \* \* subject to the provisions of this section, issue, and from time to time amend, orders applicable to processors, associations of producers, and others engaged in the handling of any agricultural commodity or product thereof specified in subsection (2) of this section.”

Could there be a more specific definition of a complete control over agricultural commodities and those engaged therein than that shown to be vested in the Secretary of Agriculture, even to the extent of rule-making power having the force and effect of a statute, and administrative power evidenced by the entry of orders having the force and effect of law?

Significant, likewise, is the fact that Congress used the term “shall” in connection with the exercise of this power, thereby to exclude the thought that the Secretary be vested with a discretionary power which might be implied from the use of the word “may”; but Congress used the word “shall,” meaning mandatory, and not the word “may,” meaning discretionary. Had it been the intention of Congress to make the functions of the Secretary of Agriculture *purely advisory* and *not supreme and exclusive*, why the specific provision in paragraph (c) of section 610, conferring upon the Secretary of Agriculture power to promulgate rules having the force and effect of statutes? Why did Congress interfere with the jurisdiction of the court by conferring upon the Secretary the power to enter orders superseding the initial judicial power if it was not intended to give the Secretary original and complete jurisdiction?

Reverting to sec. 608, subsec. 1, note that the recital is not that if the Secretary, in his discretion, is of the opinion that there is anything wrong in this market that he shall institute investigation, but that the mandatory

duty is devolved upon the Secretary to investigate, as witness the recital of the section: "He shall cause an immediate investigation to be made to determine such facts; and if, upon the basis of such investigation, the Secretary finds the existence of such facts, he shall proclaim such determination and shall exercise one or more of the powers conferred upon him."

Under the Agricultural Adjustment Act of 1933, the Secretary of Agriculture was not limited in the issue of licenses to voluntary marketing agreements with or without referenda, but had exclusive and plenary jurisdiction over agricultural commodities, including milk, in the complete domain of such commodities in all instances, separate and apart from marketing agreements. In other words, the Secretary stepped into any area, the territorial boundaries whereof he, himself, fixed and determined; and over such area took exclusive administrative jurisdiction.

The 1935 amendment of the 1933 Act changed the term "license" to "order" in instances to cover the Secretary's exercise of jurisdiction over a milk shed or milk marketing area, the territorial limits whereof had been fixed by him. The 1937 Agricultural Marketing Agreement Act reenacted and confirmed the provisions of the two earlier Acts and provided that, in case of marketing agreements, the Secretary had the optional and discretionary power to submit question of the marketing order to referendum, but the Secretary is under no mandatory duty to submit any marketing order, whether voluntary or involuntary, to a referendum.

Let us proceed mathematically to demonstrate that the provision as to referendum, upon which the Government places its principal reliance, is not compulsory upon the Secretary and is not controlling of his jurisdictional powers, but is expressly and specifically defined by the

words "*may conduct a referendum among producers,*" and not by the words "*shall conduct a referendum among producers.*"

Thus will be demonstrated, by an examination of the pertinent sections of the Agricultural Adjustment Acts to which we now come, that full, complete, supreme and plenary jurisdiction over agricultural commodities, including milk, is vested in the Secretary of Agriculture, and that the exercise of such jurisdiction by the Secretary of Agriculture is not restricted to the approval of any person engaged in the production, marketing or handling of agricultural commodities, including milk.

To demonstrate that such exclusive, supreme and plenary jurisdiction is vested in the Secretary of Agriculture by the Agricultural Marketing Acts, beginning with the 1933 Act, as amended in 1935 and 1937, the following sections are conclusive: In sec. 608c, U.S.C., Tit. 7, will be noted the following language:

"(1) The Secretary of Agriculture *shall*, subject to the provisions of this section, *issue*, and from time to time *amend, orders* applicable to processors, associations of producers, and others engaged in the handling of any agricultural commodity or product thereof specified in subsection (2) of this section. \*\*\*\*"

"(3) Whenever the Secretary of Agriculture has reason to believe that the issuance of an order will tend to effectuate the declared policy of this chapter with respect to any commodity or product thereof specified in subsection (2) of this section, he *shall* give due notice of and an opportunity for a hearing upon a proposed order."

Under this subsection (3), it will be noted that the Secretary of Agriculture, alone, is the one to determine whether or not he has reason to believe that the issuance of such an order will tend to effect the declared policy of the

law. It is clear that the Secretary, in reaching such a conclusion, does not have to consult with anyone.

"(4) After such notice and opportunity for hearing, the Secretary of Agriculture *shall* issue an order if he finds, and sets forth in such order, upon the evidence introduced at such hearing . . . that the issuance of such order and all of the terms and conditions thereof will tend to effectuate the declared policy of this chapter with respect to such commodity."

There is no restriction placed upon the Secretary of Agriculture by the preceding subsection (4) as to the character of evidence, the sufficiency thereof, or the method by which such evidence be introduced at the hearing. So long as a notice has been given and an opportunity for hearing is had, the law is complied with whether or not anyone attended the hearing. This subsection does not prohibit the Secretary of Agriculture from introducing any kind of evidence which he desires. A bare statement into the record by even one witness (who could be the Secretary of Agriculture), without corroboration, to the effect that the contemplated order was approved or favored by the requisite number of producers, would be sufficient authority for the issuance of a marketing order by the Secretary. Upon such evidence the Secretary is not required to submit by referendum to the producers the question of such approval or favoring.

Section 608c in subsection (19) provides:

"(19) For the purpose of ascertaining whether the issuance of an order is approved or favored by producers, as required under the applicable provisions of this chapter, the Secretary *may* conduct a referendum among producers. . . ."

This section does not require the Secretary to conduct a referendum among producers at all. If it had been intended by Congress that the Secretary of Agriculture could not issue orders without the approval of the requisite

number of producers, it would have provided that the Secretary "*shall* conduct a referendum among producers." The question of the issuance of an order is completely within the control of the Secretary of Agriculture.

Under the provisions of subsection (4), even though the hearing provided for may be perfunctory, and even though the evidence introduced be nothing more than a statement into the record by the Secretary of Agriculture, or his representative, that the issuance of such order, and all of the terms and conditions thereof, will tend to effectuate the declared policy of the law with respect to agricultural commodities, including milk; and if, in addition thereto, there is a perfunctory statement that such order is approved or favored by the requisite number of producers, then the requirements of subsection (9) are complied with, viz.:

"(9) Any order issued pursuant to this section shall become effective in the event that, notwithstanding the refusal or failure of handlers \*\*\* of more than 50 per centum of the volume of the commodity or product thereof \*\*\* to sign a marketing agreement relating to such commodity or product thereof, on which a hearing has been held, the Secretary of Agriculture, with the approval of the President, determines:

"(A) That the refusal or failure to sign a marketing agreement \*\*\* by the handlers \*\*\* of more than 50 per centum of the volume of the commodity or product thereof \*\*\* tends to prevent the effectuation of the declared policy of this title with respect to such commodity or product, and

"(B) That the issuance of such order is the only practical means of advancing the interests of the producers of such commodity pursuant to the declared policy, and is approved or favored:

"(i) By at least two-thirds of the producers. \*\*\*"

It is apparent that if there is any evidence offered at the time of the hearing in connection with such order,

that the order is approved or favored by the requisite number of the producers, the Secretary is empowered, by subsec. (4), sec. 608c, Tit. 7, U.S.C., to issue the order. In fact, the subsection provides that the Secretary of Agriculture shall issue such an order if he finds, and sets forth in the order, upon the evidence introduced at such hearing, that the issuance of such order will tend to effectuate the declared policy of the law.

The only significance of the provisions of subsec. (19) is that, if the Secretary did not want to assume full responsibility for the issuance of an order in any given marketing area, he could order a referendum if he so saw fit, but the mere fact that the Secretary may conduct a referendum among producers, as provided in said subsection, does not prevent the exercise of full and complete jurisdiction over agricultural commodities, including milk, by the Secretary, if he sees fit so to do. The fact remains that the absolute power is in the Secretary to issue such an order without the approval of the handler or the producer. If, for example, the Secretary determined, in his own mind, that the issuance of such an order was necessary to effectuate the declared policy of the law within any given marketing area, he could cause to be introduced in evidence, at the hearing in connection with such order, any evidence to the effect that the issuance of such order, and all of the terms and conditions thereof, will tend to effectuate the declared policy and that the issuance of such order is approved or favored by the requisite number of producers; whereupon he could completely disregard any evidence to the contrary. The Secretary alone is empowered, under the provisions of the Act, to make findings in connection with the evidence introduced at the hearing.

Subsection (4) specifically says: "The Secretary of

Agriculture shall issue an order if he finds, and sets forth in such order, upon the evidence introduced at such hearing \*\*\* that the issuance of the order will tend to effectuate the declared policy of the Act. It is to be assumed that evidence caused to be introduced by the Secretary would be of controlling weight in his mind in reaching a finding, over testimony introduced by others which might be contrary to the effect of the evidence caused to be introduced by the Secretary. It is thus clear that the Secretary of Agriculture is in complete control of (1) reason to believe that the issuance of an order will tend to effectuate the declared policy of the law; (2) what is to be set forth in the order; (3) the finding of facts to be adduced from evidence introduced at the hearing relating to such an order; and, finally, that the issuance of such an order will tend to effectuate the declared policy of the law. The only way that such a finding can be challenged by anyone is under the provisions of sec. 608c(15)(A), Tit. 7, U. S. C.: .

"Any handler subject to an order may file a written petition with the Secretary of Agriculture, stating that any such order or any provision of any such order or any obligation imposed in connection therewith is not in accordance with law and praying for a modification thereof or to be exempted therefrom. He shall thereupon be given an opportunity for a hearing upon such petition, in accordance with regulations made by the Secretary of Agriculture, with the approval of the President. After such hearing, the Secretary shall make a ruling upon the prayer of such petition, which shall be final, if in accordance with law."

It will be noted that the penal provisions of said Act are set forth in sec. 608c(14), Tit. 7, U. S. C.: :

"Any handler subject to an order issued under this section, or any officer, director, agent, or employee of"

such handler, who violates any provision of such order (other than a provision calling for payment of a pro rata share of expenses) shall, on conviction, be fined not less than \$50 or more than \$500 for each such violation, and each day during which such violation continues shall be deemed a separate violation:

• • •

It is significant that there is no provision under the law by which producers can challenge a finding by the Secretary of Agriculture that such order was approved or favored by the requisite number of producers.

To show the further absolute jurisdiction placed in the Secretary of Agriculture, see. 608c(16)(A), Tit. 7, U. S. C. provides:

*"The Secretary of Agriculture shall, whenever he finds that any order issued under this section, or any provision thereof, obstructs or does not tend to effectuate the declared policy of this title, terminate or suspend the operation of such order or such provision thereof."*

So that the Court will note that the argument in the Government's brief that the Secretary is empowered to terminate an order or suspend its operation only when such termination is favored by a majority of the producers affected by the program, is contradicted by the plain provision of the Act, and that the Government's reliance is based upon sec. 608c(16)(B), Tit. 7, U. S. C., wherein it is provided that, if the termination of an agreement or an order is favored by a majority of the producers, at the end of the then current marketing period for such commodity, the Secretary shall terminate such marketing agreement or order. But this case does not fall under that category, in that subsec. (16)(A) contains no such limitation.

The above recapitulation of the applicable provisions shows that the Government's argument that the powers

conferred upon the Secretary are not self-executing but depend upon the approval of the producers and handlers of the commodity subject to the order, is not borne out from the plain language of the Act above summarized. Obviously, no law is self-executing. The execution must be by some individual, *i. e.*, the officer charged with the duty of executing the provisions of the law.

As already stated, it is not for this Court to weigh the quantum of jurisdiction devoived upon the Secretary of Agriculture over agricultural commodities or milk. If it appears—and the Government has, in fact, substantially so admitted—that the Seeretary has some material and substantial jurisdiction in the premises, both administrative and for the entry of orders in connection with which penalties are provided by the plain provisions of the Act, the argument of the Government falls of its own weight, for, in its last analysis, it amounts to the assertion of a claim that there is partnership of jurisdiction between the executive department and the judicial department—a partnership forbidden by the Constitution.

The non-exercise or partial exercise of jurisdiction by the officer to whom the enforcement is committed, does not defeat the jurisdiction vested in such officer. If it were within the power of the officer to abate jurisdiction by the simple device of nonfeasance, the officer, in that event, would become a super-legislative body, with capacity to repeal Acts of Congress, which right is only vested in Congress by the Constitution.

If there be any doubt as to the concession by the Government in this case that some power is vested in the Secretary of Agriculture to regulate agricultural commodities and those engaged in the production and handling thereof under the Agricultural Acts, such doubt is completely dispelled by reference to the *Rock Royal* case,

wherein is found an absolute assertion that there is power in the Secretary of Agriculture to issue orders regulating agricultural commodities, including milk.

The following language of Mr. Justice Reed, in the *Rock Royal* case, is significant in demonstrating how far the Secretary of Agriculture may go in exercising jurisdiction vested in him by the several Agricultural Marketing Acts, even to the extent of creating a monopoly:

"These associations of producers of milk have a vital interest in the establishment of an efficient marketing system. This adequately explains their interest in securing the adoption of an order believed by them to be favorable for this purpose. If ulterior motives of corporate aggrandizement stimulated their activities, their efforts were not thereby rendered unlawful. If the act and order are otherwise valid, the fact that their effect would be to give cooperatives a monopoly of the market would not violate the Sherman Act or justify the refusal of the injunction."

The Government contends that, if Congress had intended to confer complete exemption from the operation of the Sherman Act upon production and marketing of agricultural commodities, it would have done so by clear and explicit language. The plain answer to that contention is that, in sec. 608b (U. S. C., Tit. 7), in force since the original Agricultural Adjustment Act of May 12, 1933, c. 25 (48 Stat. L. 34) Tit. I, sec. 8(2), as renumbered 8b and amended August 24, 1935, c. 641, sec. 4, 49 Stat. L. 753; as amended June 3, 1937, c. 296, sec. 1, 50 Stat. L. 246, by the following specific provision. The Congress expressly exempted agreements entered into between the producers and the Secretary of Agriculture from the operation of the Antitrust Laws. To quote sec. 608b:

"In order to effectuate the declared policy of this chapter, the Secretary of Agriculture shall have the

power; after due notice and opportunity for hearing, to enter into marketing agreements with processors, producers, associations of producers, and others engaged in the handling of any agricultural commodity or product thereof, only with respect to such handling as is in the current of interstate or foreign commerce or which directly burdens, obstructs, or affects, interstate or foreign commerce in such commodity or product thereof. The making of any such agreement shall not be held to be in violation of any of the antitrust laws of the United States, and any such agreement shall be deemed to be lawful: *Provided*, That no such agreement shall remain in force after the termination of this chapter. For the purpose of carrying out any such agreement the parties thereto shall be eligible for loans from the Reconstruction Finance Corporation under section 605 of Title 15. Such loans shall not be in excess of such amounts as may be authorized by the agreements. May 12, 1933, c. 25, Title I, § 8(2), 48 Stat. 34; Apr. 7, 1934, c. 103, § 7, 48 Stat. 528; as renumbered § 8b and amended Aug. 24, 1935, c. 641, § 4, 49 Stat. 753; as amended June 3, 1937, c. 296, § 1, 50 Stat. 246."

The mere reference, in said section 608b, to the exemption from the Antitrust Laws of such agreements, clearly establishes an intention of Congress to completely remove all doubt as to the application of the Sherman Act over agricultural commodities, for it is only agreements in restraint of trade, etc., which are prohibited by the Sherman Act; but the Sherman Act never at any time made it a criminal offense against the United States for any citizen to comply with an order issued by any executive or administrative officer pursuant to statute. Therefore, it was not necessary to provide in the Agricultural Adjustment Act, and as amended, that licenses or orders issued by the Secretary were not within the purview of the Sherman Act, because they never were. The very spirit of the Agricultural Acts, as well as their remedial, if not altruistic-

tic nature, precludes the thought that the benign, exclusive exercise of executive and administrative jurisdiction over agricultural commodities in the time of economic calamity did not amount to a carving from the initial judicial power of the district courts. It is a clear demonstration of the intent of Congress to place supervision over production, marketing and handling of agricultural commodities in the hands of a highly specialized department, where the problems of production, marketing and handling of agricultural commodities was thoroughly understood and could be handled by experts, rather than to place such problem in the hands of inexperienced jurors, called to pass upon the technical phases pertaining to the production, etc., of agricultural commodities.

To bolster up its contention that Congress had not intended to exempt the production, etc., of agricultural commodities from the operation of the Sherman Act, the Government proceeds to present a galaxy of excerpts from the Congressional Record. In that process, quotations are presented from debates in each House, all with a view of overriding the plain language of statutes by the then opinion of certain members of each House, which respective opinions, for aught that the Congressional Record discloses, may substantially have been changed and may not have been in the minds of the majority of the members of both Houses when they voted in favor of the enactment. Here, again, the Government answers its contention by citing *United States v. Trans-Missouri Freight Association*, 166 U. S. 290, wherein this Court, in stating the doctrine that debates during the course of the passage of a Bill can not be considered in the construction of a statute, at p. 318, says:

"All that can be determined from the debates and reports is that various members had various views,

and we are left to determine the meaning of this act, as we determine the meaning of other acts, from the language used therein.

"There is, too, a general acquiescence in the doctrine that debates in Congress are not appropriate sources of information from which to discover the meaning of the language of a statute passed by that body. *United States v. Union Pacific Railroad Company*, 91 U. S. 72, 79; *Aldridge v. Williams*, 3 How. 9, 24, Taney, Chief Justice; *Mitchell v. Great Works Milling & Manufacturing Company*, 2 Story, 648, 653; *Queen v. Hertford College*, 3 Q. B. D. 693, 707.

"The reason is that it is impossible to determine with certainty what construction was put upon an act by the members of a legislative body that passed it by resorting to the speeches of individual members thereof. Those who did not speak may not have agreed with those who did; and those who spoke might differ from each other; the result being that the only proper way to construe a legislative act is from the language used in the act, and, upon occasion, by a resort to the history of the times when it was passed. \* \* \*

We fail to see what comfort the Government derives from urging that section 3a of the Marketing Agreement Act, authorizing mediation and arbitration of disputes arising out of the marketing of milk, has any application to the general subject of producers' agreements with the Secretary of Agriculture, necessarily involving third, and even fourth, parties. As shown by the quotation of section 608b in the subheading last above, the very subject matter of this indictment, viz., arrangements between producers and distributors, was under the sole and complete control and dominion of the Secretary of Agriculture, exercising his executive jurisdiction under License 30 in the Chicago Milk Shed, from January 1, 1935, to March 2, 1935, and prior thereto, as this Court may judicially notice and is, indeed, admitted in the Government's brief.

So, too, are we at a loss to understand why the Government departs from the record (Gov. brf., p. 54) to quote a lengthy excerpt from a speech delivered by the Secretary of Agriculture after the rendition of the opinion of the District Court herein. The self-serving public declaration of the Secretary of Agriculture, as set forth by the Government, has no place in the Government's brief. Certainly, the Secretary of Agriculture did not adhere to the view recited in his speech, in view of the fact—which this Court may judicially notice—that he (the same Secretary of Agriculture) did, in fact, exercise the jurisdiction devolved upon him by the Agricultural Act, after the rendition of the judgment appealed from, and did, in fact, on September 1, 1939, actively take complete control of the Chicago Agricultural Marketing Area under his Order No. 41 (Fed. Reg., Vol. 4, pages 3764-3768, 3770, of August 30, 1939).

### III.

#### **AS TO THE PURE MILK ASSOCIATION.**

Having been advised by counsel for the Pure Milk Association that they intend to fully answer the Government's Point III in their brief, we shall not argue that point here.

### IV.

**Even if this Honorable Court should be of the opinion that it has appellate jurisdiction and that the district court had jurisdiction of the subject matter, this appeal should nevertheless be dismissed, as it involves a moot controversy and is wanting in present actuality.**

This Court will judicially notice that, after the rendition of the judgment appealed from by the Government,

the Secretary of Agriculture, pursuant to authority and jurisdiction devolved upon him by the Agricultural Marketing Agreement Act of 1937, again took jurisdiction of agricultural commodities and those engaged in the production and handling thereof, in the Chicago Milk Marketing Area and has been since, and is now, exercising his said executive and administrative jurisdiction in said area. (See Fed. Reg., Vol. 4, p. 3764-3768, 3770, of August 30, 1939—Marketing Order No. 41, Secretary of Agriculture.)

Parenthetically, it should be noted that the indictment, in each count thereof, charges that the alleged conspiracy was formed in January, 1935; notwithstanding that, during the month of January, 1935, and up to March 2, 1935, these Appellees, in fact, under License No. 30 of the Secretary of Agriculture, operated and were under the sole and exclusive active jurisdiction of the Secretary of Agriculture, as we have already demonstrated.

The subject matter embraced by the allegations of the several counts of the indictment, for the foregoing reasons, presents a moot controversy, wanting in present actuality.

A controversy which has become moot and wanting in present actuality is one which may be judicially noticed by this Court, and such appeal may be dismissed because of such judicial notice. (*Mills v. Green*, 159 U. S. 651; *Tennessee v. Condon*, 189 U. S. 64, 69; *Wilson v. Shaw*, 204 U. S. 24, 30; *Richardson v. McChesney*, 218 U. S. 487, 492; *U. S. v. Hamburg-A. P. A. G.*, 239 U. S. 466, 475; *U. S. v. Alaska S. S. Co.*, 253 U. S. 113, 115; *Able State Bank v. Bryan*, 282 U. S. 765, 777; *Gibbes v. Zimmerman*, 290 U. S. 326, 331.)

Wherefore, the appeal should be dismissed.

## CONCLUSION.

For the several reasons herein presented, it is deferentially urged that the appeal be dismissed, or, in the alternative, that the judgment appealed from be affirmed.

Respectfully submitted,

LOY N. MCINTOSH,

BERNHARDT FRANK,

FREDERICK SECORD,

*Counsel for Said Appellees.*

GANN, SECORD, STEAD & MCINTOSH,

*Of Counsel.*

**APPENDIX A**

Docket No. 1

**UNITED STATES DEPARTMENT OF AGRICULTURE  
AGRICULTURAL ADJUSTMENT ADMINISTRATION****LICENSE SERIES—LICENSE No. 30****LICENSE FOR MILK  
CHICAGO SALES AREA  
AS AMENDED****WITH THE FOLLOWING EXHIBITS****Exhibit A  
Marketing Plan****Exhibit B****Rules for Establishment of Bases**

Issued by the Acting Secretary of Agriculture, May 31, 1934. Effective date June 1, 1934 (12:01 a. m., eastern standard time).

**LICENSE FOR MILK—CHICAGO SALES AREA, AS AMENDED**

WHEREAS, it is provided by Section 8 of the Act as follows:

"Section 8. In order to effectuate the declared policy, the Secretary of Agriculture shall have power—

"(3) To issue licenses permitting processors, associations of producers, and others to engage in the handling, in the current of interstate or foreign commerce, of any agricultural commodity or product thereof, or any competing commodity or product thereof. Such licenses shall be subject to such terms and conditions, not in conflict with existing Acts of Congress or regulations pursuant thereto, as may be necessary to eliminate unfair prac-

tices or charges that prevent or tend to prevent the effectuation of the declared policy and the restoration of normal economic conditions in the marketing of such commodities or products and the financing thereof . . . .

"(4) To require any licensee under this section to furnish such reports as to quantities of agricultural commodities or products thereof bought and sold and the prices thereof, and as to trade practices and charges, and to keep such systems of accounts, as may be necessary for the purpose of part 2 of this title"; and

WHEREAS, the Secretary, acting under the provisions of said Act, for the purposes and within the limitations therein contained, and pursuant to the regulations issued thereunder, has, on the third day of February, 1934, issued a License for Milk—Chicago Sales Area; and

WHEREAS, the Secretary has determined to modify the terms and conditions of the aforesaid License;

Now, THEREFORE, the Secretary of Agriculture, acting under the authority vested in him as aforesaid;

Hereby amends and modifies the terms and conditions of the said License and hereby licenses each and every distributor to engage in the business of distributing, marketing, or handling milk or cream as a distributor in the Chicago Sales Area, subject to the following terms and conditions:

## I.

As used in this License as amended (hereafter called the "License") the following words and phrases shall be defined as follows:

A. "Producer" means any person, irrespective of whether any such person is also a distributor, who produces milk in conformity to the applicable health requirements of the Chicago Sales Area for milk to be sold for consumption as whole milk in the Chicago Sales Area.

B. "Distributor" means any of the following persons, irrespective of whether any such person is a producer or an association of producers, wherever located or operating, whether within or without the Chicago Sales Area, engaged in the business of distributing, marketing, or in

any manner handling, in whole or in part, whole milk or cream (including ice cream mix and ice cream) for ultimate consumption in the Chicago Sales Area:

1. Persons,

- (a) who pasteurize, bottle, or process milk or cream;
- (b) who distribute milk or cream at wholesale or retail (1) to hotels, restaurants, stores or other establishments for consumption on the premises, (2) to stores or other establishments for resale, or (3) to consumers;
- (c) who operate stores or other establishments selling milk or cream at retail for consumption off the premises.

2. Persons who purchase, market or handle milk or cream (including ice cream mix and ice cream) for resale in the Chicago Sales Area.

C. "Chicago Sales Area" means and includes the City of Chicago, Illinois, and all of that territory lying within thirty-five miles of the corporate limits of Chicago.

D. "Secretary" means the Secretary of Agriculture of the United States.

E. "Act" means the Agricultural Adjustment Act approved May 12, 1933, as amended.

F. "Person" means individual, partnership, corporation, association or any other business unit.

G. "Subsidiary" means any person of, or over whom or which, a distributor or an affiliate of a distributor has, or several distributors collectively have, either directly or indirectly, actual or legal control, whether by stock ownership or in any other manner.

H. "Affiliate" means any person and/or any subsidiary thereof, who or which has, either directly or indirectly, actual or legal control, of or over a distributor, whether by stock ownership or in any other manner.

I. "Books and Records" means books, records, accounts, contracts, memoranda, documents, papers, correspondence, or other data, pertaining to the business of the person in question.

J. "Market Administrator" means the person designated pursuant to Exhibit A, which is attached hereto and made a part hereof.

## II.

1. The schedule governing the prices at which, and the terms and conditions under which, distributors shall purchase and/or accept delivery of milk from producers, shall be that set forth in Exhibit A. Any contract or agreement entered into between any distributor and producer, prior to the effective date of this License, covering the purchase and/or delivery of milk, shall be deemed to be superseded by the terms and provisions of this License in so far as such contract or agreement is inconsistent with any provisions hereof.

2. Except as provided in Exhibit A, no distributor shall purchase milk from producers except: (a) those producers having bases, which are to be reported as provided in Exhibit B, which is attached hereto and made a part hereof; and (b) new producers pursuant to the provisions of Exhibit A.

3. No distributor shall purchase milk from any producer unless such producer authorizes such distributor, with respect to payments for milk purchased from such producer, to comply with the provisions of Exhibit A.

4. (a) The distributors shall severally, from time to time, upon the request of the Secretary, furnish him with such information as he may request, on and in accordance with forms of reports to be supplied by him, for the purposes of (1) assisting the Secretary in the furtherance of his powers and duties with respect to this License and/or (2) enabling the Secretary to ascertain and determine the extent to which the declared policy of the Act and the purposes of this License are being effectuated: such reports to be verified under oath. The Secretary's determination as to the necessity of and the justification for the making of any such reports, and the information called for thereby, shall be final and conclusive.

(b) For the same purposes and/or to enable the Secretary to verify the information furnished him on said forms of reports, all the books and records of each dis-

tributor and the books and records of the affiliates and subsidiaries of each distributor shall, during the usual hours of business, be subject to the examination of the Secretary. The Secretary's determination as to the necessity of and the justification for any such examination shall be final and conclusive.

(c) The distributors and their respective affiliates and subsidiaries shall severally keep books and records which will clearly reflect all the financial transactions of their respective businesses and the financial condition thereof.

(d) All information furnished the Secretary, pursuant to this paragraph, shall remain confidential in accordance with the applicable General Regulations, Agricultural Adjustment Administration.

5. No distributor shall purchase milk or cream from, or process or distribute milk or cream for, or sell milk or cream to, any other distributor who he has notice is violating any provision of this License, without first reporting such violation to the Market Administrator.

6. The Secretary may, by designation in writing, name any person, including any officer or employee of the Government, to act as his representative in connection with any of the powers provided in this License to be exercised by the Secretary.

7. Each distributor who is obligated to report pursuant to paragraph 4 of Section A of Exhibit A shall within thirty days after the effective date of this License, furnish to the Market Administrator a bond with good and sufficient surety thereon, satisfactory to the Market Administrator (in an amount not in excess of the purchase value of the milk purchased by such distributor during any two successive delivery periods as designated by the Market Administrator) for the purpose of securing the fulfillment of such distributor's obligations as provided in Exhibit A. Any distributor who commences to do business after the effective date of this License shall, as a condition precedent to engaging in such business, furnish to the Market Administrator a bond in conformity with the foregoing provision.

The Market Administrator may, (a) if satisfied from the investigation of the financial conditions of a dis-

tributor that such distributor is solvent and/or possessed of sufficient assets to fulfill his said obligations, or (b) if pursuant to a state statute, a distributor has furnished a bond with good and sufficient surety thereon in conformity with the foregoing provision, waive the requirement of the bond as to any such distributor. Such distributor may, upon a change in such circumstances be required by the Market Administrator to comply with the foregoing requirement.

Each distributor who is unable to meet the requirements of the foregoing provisions, shall make deposits with the Market Administrator at such times, in such amounts, and in such manner as the Market Administrator may determine to be necessary in order to secure the fulfillment of such distributor's obligations as provided in Exhibit A.

8. Each and every distributor shall fulfill any and all of his obligations which shall have arisen, or which may hereafter arise in connection with deliveries of milk made pursuant to the License for Milk—Chicago Milk Shed, issued by the Secretary on July 28, 1933, and as amended, and said License for Milk—Chicago Sales Area, issued by the Secretary on February 5, 1934.

9. If the applicability of any provision of this License to any person, circumstance or thing is held invalid, the applicability thereof to any other person, circumstance or thing, shall not be affected thereby, nor shall the validity of the remainder of this License be affected thereby.

If any provision of this License is declared invalid, the validity of the remainder of this License shall not be affected thereby.

10. Nothing herein contained shall be construed in derogation of the right of the Secretary to exercise any powers granted him by the Act, and in accordance with such powers, to act in the premises whenever he shall deem it advisable.

11. This License shall take effect as to every distributor at the time and upon the date set forth herein above the signature of the Secretary.

12. In the event this License is terminated or amended by the Secretary, any and all obligations which shall have

arisen, or which may thereafter arise in connection therewith, by virtue of or pursuant to this License, and any violations of this License which may have occurred prior to such termination or amendment, shall be deemed not to be affected, waived or terminated by reason thereof, unless so expressly provided in the notice of termination of, or the amendment to the License.

13. The Secretary hereby determines that an emergency exists which requires a shorter period of notice than three days and that the period of notice, with respect to the issuance of this License, which is hereinafter provided, is reasonable under the circumstances.

IN WITNESS WHEREOF, I, R. G. Tugwell, Acting Secretary of Agriculture, do hereby execute in duplicate and issue this License on this 31st day of May, 1934, and pursuant to the provisions hereof, declare this License, as amended, to be effective on and after 12:01 A. M., Eastern Standard Time, June 1, 1934.

R. G. TUGWELL,  
*Acting Secretary of Agriculture.*

## EXHIBIT A.

### MARKETING PLAN

#### SECTION A. Cost of Milk to Distributors

1. Each distributor, except as hereinafter provided, shall be obligated to pay, in the manner hereinafter provided, the following prices for milk, of 3.5 percent butterfat content, which he has purchased from producers, delivered f. o. b. distributor's country plant, platform, or loading station located within 70 miles from the City Hall in Chicago, Illinois:

Class I—\$2.00 per hundredweight.

Class II—For each one hundred pounds of milk—to the average price per pound of 92 score butter at wholesale in the Chicago market, as reported daily by the United States Department of Agriculture for the delivery

period during which such milk is purchased, add 12 cents per pound, then multiply by 3.5.

**Class III**—For each one hundred pounds of milk, 3.5 times the average price per pound of 92 score butter at wholesale in the Chicago market as reported daily by the United States Department of Agriculture, for the delivery period during which such milk is purchased, to which amount shall be added 4 cents; unless there shall be in effect a price established pursuant to an applicable Marketing Agreement and/or License, issued pursuant to the Act, for any of the products used in this classification in which event the price for such portion shall be that established by the aforementioned Agreement and/or License.

The above prices shall apply to milk purchased outside the 40 mile zone, except as provided in Section B.

The term "delivery period" shall mean the period from the 1st to, and including, the last day of each month.

2. Class I milk means all milk sold or distributed by distributors as whole milk for consumption in the Chicago Sales Area.

Class II milk means all milk used by distributors to produce cream for sale or distribution by distributors as cream for consumption within the Chicago Sales Area and for the manufacture of ice cream mix or ice cream for consumption in the Chicago Sales Area. The term "cream" shall hereinafter be deemed to include "ice cream mix and ice cream".

Class III Milk means the quantity of milk purchased, sold, used or distributed by distributors in excess of Class I and Class II milk.

Milk delivered to a distributor by producers during any delivery period and sold or distributed as milk or cream outside the Chicago Sales Area or sold by such distributor to another distributor (including any person, defined as such, in the License who sells, uses or

distributes such milk or cream for ultimate consumption in any market with respect to which no License is in effect pursuant to Section 8 (3) of the Act covering such purchase from producers and such sale as milk or cream) shall be accounted for by the first distributors as Class I or Class II milk, respectively, unless such first distributor, on or before the date fixed for filing reports with the Market Administrator for such delivery period, shall furnish to the Market Administrator proof satisfactory to the Market Administrator that such milk or cream has been utilized for a purpose other than sale, use or distribution for ultimate consumption as milk or cream, in which event such milk shall be classified in accordance with such other use.

Any distributor purchasing milk and/or cream from another distributor shall, on or before the date fixed for filing reports with the Market Administrator, pursuant to paragraph 4 hereof, furnish to the distributor from whom he purchased such milk and/or cream, an affidavit as to the quantity of milk and/or cream sold, used or distributed in each of the classifications herein defined:

Any distributor who does not sell or distribute whole milk for ultimate consumption in the Chicago Sales Area, may purchase milk from producers who have no established bases. Such distributor

- (a) shall pay to producers the Class II price provided for above for the milk purchased by him and used to produce cream shipped into, sold or distributed, as such, by him for consumption in the Chicago Sales Area;
- (b) shall not be subject to any of the terms or provisions of this Exhibit, with respect to milk purchased from producers who have no established bases, except as provided in subparagraph (a) above, and in paragraph 1 of Section D; but
- (c) shall, with respect to such milk, submit to the Market Administrator reports containing such information as the Market Administrator may require, similar to the kind of information required by other distributors pursuant to paragraph 4 hereof, which information shall be kept confidential as provided in said paragraph.

3. *The established base* for each producer shall be the quantity of milk allotted to such producer in accordance with the provisions of Exhibit B.

The delivered base for each producer shall be that quantity of milk delivered by such producer to distributors which is not in excess of ninety percent of the established base of such producer. The Market Administrator may, in his discretion, at any time adjust such percentage so that the total of all delivered bases shall, as far as practicable, be equal to the quantity of milk used by distributors as Class I and Class II milk, provided that such percentage shall in no event be less than eighty percent nor more than one hundred per cent of the base of each producer.

4. On or before the 7th day of each delivery period, each distributor to whom milk or cream was delivered during the preceding delivery period by (1) producers (who are not also distributors) and/or (2) distributors (other than those who operate only stores or other similar establishments) shall report to the Market Administrator with respect to milk or cream delivered during such delivery period in a manner prescribed by the Market Administrator:

- (1) The actual deliveries, if any, at each location of the producers supplying such distributor, the total quantity of milk represented by the delivered bases of all such producers, and the total quantity of milk represented by the excesses over delivered bases of all such producers;
- (2) The actual deliveries, if any, made to him by other distributors;
- (3) The quantities of milk delivered which were sold, used or distributed by him as Class I, Class II and Class III milk, respectively, and
- (4) Such other information as the Market Administrator may request for the purpose of performing the provisions of this Exhibit.

All information furnished the Market Administrator pursuant to this paragraph shall remain confidential in accordance with the provisions of the applicable General

Regulations, Agricultural Adjustment Administration, but any such information shall be submitted by the Market Administrator to the Secretary at any time upon the request of the Secretary.

5. With respect to each calendar month, the Market Administrator shall:

- (a) Compute the total value, in each class, of all the milk as reported by each and all distributors pursuant to paragraph 4, on the basis of the prices set forth in paragraph 1, making the proper adjustments as provided in Section B; which computation shall not include milk purchased by distributors from other distributors.
- (b) Compute the total quantity of milk by hundred-weight represented by the delivered bases of all the producers as reported pursuant to paragraph 4.
- (c) Compute the value of the milk purchased, sold or used by all distributors in excess of the total delivered bases as reported pursuant to paragraph 4 of all producers by multiplying such excess quantity of milk by the price provided for in paragraph 1 for Class III milk.
- (d) Compute the total value of the milk represented by the total delivered bases of all producers by subtracting from the amount obtained in subdivision (a) the amount obtained in subdivision (c).
- (e) Compute the total adjusted value of the quantity of milk represented by the total delivered bases of all producers, as reported by the distributors pursuant to paragraph 4, by adding to the total value of such milk as computed pursuant to subdivision (d) the adjustments provided for in Section C (1).
- (f) Compute the blended price for the quantity of milk represented by the total delivered bases of all producers by dividing the amount obtained in subdivision (e) by the quantity of milk represented by the total delivered bases of all producers as determined in subdivision (b).

6. On or before the 12th day of each delivery period the Market Administrator shall notify all distributors who have reported pursuant to paragraph 4, of the blended price as determined above and of the Class III price as provided for in paragraph 1 above.

Each such distributor shall pay to all producers, on or before the 18th day of each delivery period, for milk delivered by such producers during the preceding delivery period subject to adjustments and deductions which are to be made pursuant to Sections C and D of this Exhibit:

- (a) At the blended price for the quantity of milk delivered by each producer represented by such producer's delivered base; and
- (b) At the Class III price for the quantity of milk delivered by such producer in excess of such producer's delivered base.

Provided that no provision in this License shall be construed as controlling or restricting any producers' cooperative association with respect to the actual deductions or charges, dividends or premiums to be made by such association from and/or to its members; but no such deductions or charges may be made by any such producers' cooperative association from any of its members, to meet a current operating loss incurred by such producers' cooperative association in its processing or distribution operations unless (a) expressly and specifically authorized by any such member to make such deduction or charge for such purpose, and (b) the producers' cooperative association notifies the market Administrator of the same.

7. On or before the 20th day of each delivery period, each distributor shall report to the Market Administrator in a manner prescribed by the Market Administrator as follows:

With respect to each producer: (1) his name, (2) total deliveries of milk and the average butterfat content thereof, (3) the amount of milk classified as delivered base and rate of payment of such milk, (4) the amount of milk classified as excess over delivered base and rate of payment of such milk, (5) the

total of such payments setting forth all adjustments, additions and deductions, and (6) such other similar information as the Market Administrator shall request.

8. The Market Administrator shall maintain for each distributor an adjustment account:

- (a) which shall be debited for the total value of the quantity of milk reported as received, sold, distributed or used by such distributor during the preceding delivery period computed pursuant to subdivision (a) of paragraph 5; and
- (b) which shall be credited for the total value of the quantity of milk reported by such distributor pursuant to paragraph 4 (excluding milk received from other distributors) on the basis of the prices to be paid to producers pursuant to paragraph 6. Such credit shall be made after giving effect to the adjustments to be made pursuant to paragraph 1 of Section C and before giving effect to the adjustments and deductions provided for in Sections C.(2) and D of this Exhibit.

Balances due to the Market Administrator on adjustment accounts with respect to milk purchased during any delivery period shall be paid to the Market Administrator on or before the 15th day of the following delivery period. Any funds so paid to the Market Administrator shall as soon as reasonably possible be paid out by him pro rata among the distributors in proportion to the amounts of adjustments to which, but only to the extent to which, they are entitled.

9. Any errors in computation or payments or any discrepancies in reports of distributors or in the adjustment accounts shall be adjusted when settlements are made with respect to the following delivery period. Whenever the Market Administrator has a balance on hand in excess of any adjustments to be made to distributors, he may distribute such balance or any part thereof in any equitable manner among producers in the market.

10. The Market Administrator shall at all reasonable times have the right to check sampling, weighing and butterfat tests made by distributors, for the purpose of de-

termining the accuracy thereof. Any association of producers shall at all reasonable times have the right to check sampling, weighing and butterfat tests made by distributors, in respect to milk delivered by such association's members for the purpose of determining the accuracy thereof. In the event of a discrepancy between weights and tests reported by distributors and weights and tests determined by the Market Administrator, and/or any association of producers, settlements shall be made by distributors upon the basis of such weights and such butterfat content as the Market Administrator may in each case decide.

11. Producers shall have the right to deliver milk to plants or platforms of distributors, using any reasonable method of transportation which they, in their discretion, may select. No distributor shall interfere with or discriminate against producers in the exercise of such right. At the request of the Market Administrator, each distributor shall from time to time, submit a verified report stating the actual transportation charges on all milk delivered to him f. o. b. any and all plants, for the purpose of permitting the Market Administrator to review such transportation charges and to determine the reasonableness thereof.

12. No distributor shall sell to or purchase milk or cream from distributors for Class II use, as defined in paragraph 2 hereof, at a price, per pound of butterfat, lower than 2 cents per pound butterfat above the price specified in paragraph 1 hereof, for each pound of butterfat in milk purchased from producers and classified as Class II milk. If such milk or cream is sold or purchased in the form of ice cream mix or ice cream a reasonable charge shall be added for the ingredients other than milk or cream purchased for Class II use.

The foregoing price is without prejudice to the right of any distributor who asserts that such minimum price is in excess of the price necessary to effectuate the purpose of this license and to aid in the enforcement of the provisions thereof, to a hearing on the question of a modification or amendment of this license in accordance with the applicable General Regulations, Agricultural Adjustment Administration.

13. (a) The Market Administrator shall exclude from the computations made pursuant to paragraph 5, from the provisions of paragraph 6, and from the adjustments pursuant to paragraph 8, the amount of milk reported pursuant to paragraph 4 by each distributor whose Class I sales do not exceed 15 percent of the total deliveries of milk made to such distributor during any delivery period. Each such distributor shall pay to producers from whom such distributor has purchased milk not less than the use value of such milk pursuant to paragraph 1, with the adjustments as provided in section B, and with an adjustment per hundredweight of milk of 3 cents per 1/10th of 1 percent butterfat above or below 3.5 percent butterfat, as the case may be. Each such distributor shall not make deductions from producers pursuant to section C and section D, but each such distributor shall deduct and pay over to the Market Administrator 1c per hundredweight in regard to milk sold by such distributor for Class I and Class II purposes. Each such distributor may purchase milk from producers who do not have established bases.

(b) Provided that the Market Administrator may include in the computations the reports of any distributor coming within this provision and require such distributor to comply with all provisions of the license if such distributor purchases milk only from producers with established bases and processes or manufactures milk resulting from variations in production and sales of milk for consumption in the Chicago Sales Area.

#### SECTION B. *Adjustments in Cost of Milk to Distributors.*

Each distributor shall make the following deductions from the prices to be paid for milk purchased as provided in paragraph 1 of section A:

- (a) If any producer has delivered milk to a distributor, at a country plant, platform, or loading station located more than 70 miles from the City Hall in Chicago, such distributor shall make a deduction with respect to his Class I sales of 1 cent per hundredweight for each 10 miles or part thereof in excess of 70 miles, but not in excess

of 100 miles from the City Hall in Chicago, and 1 cent per hundredweight for each 15 miles or part thereof in excess of 100 miles from the City Hall in Chicago.

Unless the prior written consent of the Market Administrator is obtained to compute the adjustments in the cost of milk to distributors made pursuant to this section, on some other basis, such adjustments shall be computed on the basis that to the extent necessary to supply each distributor with milk sold, distributed or used by him as Class I milk, the milk which was delivered to him at locations in or nearest to the Chicago Sales Area was sold, distributed or used by him as Class I milk.

- (b) On Class I and Class II milk sold, distributed or used outside the Chicago Sales Area, the difference between the Class I and Class II prices specified in paragraph 1 of section A and such prices as the Market Administrator may determine to be the market prices in the market where such milk or cream is sold, distributed or used.

### *SECTION C. Adjustments in Payments to Producers.*

1. All distributors shall make the following deductions from payments to be made to producers as provided in Section A:

If any producer has delivered milk to a distributor at a country plant, platform or loading station located more than 70 miles from the City Hall in Chicago, such distributor shall make a deduction from the payment to be made to producers with respect to such producers' delivered bases, of 1c per hundredweight for each 10 miles or part thereof in excess of 70 miles, but not in excess of 100 miles from the City Hall in Chicago, and 1c per hundredweight for each 15 miles or part thereof in excess of 100 miles from the City Hall in Chicago.

2. Each distributor shall further make the following additional payments to, or deductions from, as the case

may be, the payments to be made to producers pursuant to Section A:

- (a) If a producer has delivered to any distributor during any delivery period, milk having an average butterfat content other than 3.5%, such distributor shall pay to each such producer for each 1/10th of 1 percent of average butterfat content above 3.5%, or shall deduct for each 1/10th of 1 percent of average butterfat content below 3.5% an amount per hundredweight as follows:
  - (1) On delivered base milk 4c per hundredweight.
  - (2) On all of milk delivered in excess of delivered base an amount equal to 1/10th of the average price per pound of 92 score butter at wholesale in the Chicago market as reported by the United States Department of Agriculture for the delivery period during which such milk is purchased.

3. Any distributor, may with the prior approval of the Market Administrator, make payments to producers in addition to the prices provided for in paragraph 6 of Section A, provided that such additional payments are made to all the producers supplying such distributor with milk of similar quality and grade. No distributor may accept services from or render services to a producer or an association of producers from whom he is purchasing milk without making a reasonable payment or charge, as the case may be, for such services.

#### *SECTION D. Deductions from Payments to Producers.*

1. Each distributor making payments pursuant to Section A shall deduct 1c per hundredweight from the payments to be made by him pursuant to Section A in regard to all milk delivered to him and each distributor who does not sell or distribute whole milk for ultimate consumption in the Chicago Sales Area shall deduct 1c per hundredweight in regard to all milk delivered to him by producers which is sold as cream in the Chicago Sales Area and such payments shall be made to the Market Administrator on or before the 18th day after the last day of each delivery period.

2. Each distributor shall, in addition, deduct from the payments to be made by him pursuant to section A in regard to all milk delivered to him by producers who are not members of the Pure Milk Association, hereinafter called the "Association", an amount equal to the deductions authorized by the members of the Association for furnishing benefits to such members, which deductions from nonmembers, however, shall in no event exceed three cents per hundredweight. Such deduction shall be paid over to the Market Administrator on or before the 18th day following the last day of each delivery period.

3. The Market Administrator, in his discretion, may at any time waive the payment of the foregoing deductions (including the deductions made pursuant to paragraph 13 (a) of section A) to him, or any part thereof, for any delivery period, (in which event the deductions so waived shall not be made by the distributors from payments to producers); provided, however, that any such waiver shall be equal (a) among all producers with respect to the amounts paid to the Market Administrator pursuant to paragraph 1 above, and (b) among all producers not members of the Association with respect to the amounts deducted pursuant to paragraph 2 above.

4. The Market Administrator shall maintain separate accounts for the payments made to him pursuant to paragraphs 1 (including the deductions made pursuant to paragraph 13 (a) of section A) and 2. The Market Administrator shall apportion such moneys in the following manner:

(a) The payments made pursuant (1) to paragraph 1 and (2) to paragraph 13 (a) of section A, shall be retained by the Market Administrator to meet his cost of operation; provided, however, that any such funds which may remain over from such deductions in excess of the cost of operation for any particular delivery period shall be applied by the Market Administrator in meeting his cost of operation for the succeeding delivery period, and to the extent that it may be practical, the Market Administrator shall waive a portion of such deductions for the succeeding delivery period as hereinabove provided.

- (b) The payments made pursuant to paragraph 2 shall be retained by the Market Administrator in a separate fund and shall be expended by him for the purpose of securing for producers who are not members of the Association, market information, supervision of weights and tests, guarantee against failure by distributors to make payments for milk purchased and other similar benefits; provided, however, that the Market Administrator may, in his discretion, employ the facilities and services of any agent or agents, and pay over such amount to such agent or agents for the purpose of securing to such nonmembers the aforementioned benefits, if such benefits to nonmembers may be more efficiently and economically secured thereby. The Market Administrator shall pay over such funds to such agent or agents, if he determines to do so, only upon the consent of such agent or agents; (a) to keep its or their books and records in a manner satisfactory to the Market Administrator; (b) to permit the Market Administrator to examine its or their books and records and to furnish the Market Administrator such verified reports or other information as the Market Administrator may from time to time request; and (c) to disburse such funds in the manner above provided.
- (c) Whenever the Market Administrator has a balance on hand in either of the accounts provided for in subdivisions (a) and (b) of this paragraph, he may distribute such balance or any part thereof, in an equitable manner, among the producers; provided, however, that any such distribution of the balance in the account provided for in subdivision (a) shall be made to all producers, and any such distribution of the balance in the account provided for in subdivision (b) shall be made only to all producers not members of the Pure Milk Association.

**SECTION E. *The Market Administrator—His Designation, Duties and Compensation.***

The Secretary shall designate the Market Adminis-

trator who shall perform such duties as may be provided for him in the License. The Market Administrator so designated shall be subject to removal, at any time, by the Secretary. Within forty-five days after he enters upon his duties, the Market Administrator shall execute and deliver to the Secretary his bond in such amount as the Secretary may determine, with surety thereon satisfactory to the Secretary conditioned upon the faithful performance of his duties as such Market Administrator. The Market Administrator shall be entitled: (a) to reasonable compensation, which shall be determined by the Secretary; (b) to borrow money to meet his cost of operation until such time as the first payments are made to him pursuant to section D of this exhibit, which moneys shall be repaid out of the payments retained by the Market Administrator pursuant to paragraph 4 (a) of said section D; and (c) to incur such other expenses, including compensation for persons employed by the Market Administrator as the Market Administrator may deem necessary for the proper conduct of his duties, and the cost of procuring and continuing his bond, which total expense shall be deemed to be the cost of operation of the Market Administrator. The Market Administrator shall not be held personally responsible in any way whatsoever to any licensee or to any other person for errors in judgment, mistakes of fact or other acts, either of commission or omission except for acts of dishonesty, fraud, or malfeasance in office.

The Market Administrator shall keep such books and records as will clearly reflect the financial transactions provided for in this License. The Market Administrator shall permit the Secretary to examine his books and records at all times, and furnish the Secretary such verified reports or other information as the Secretary may, from time to time, request of him.

The Market Administrator shall have the right to examine the books and records of the distributors and the books and records of the affiliates and subsidiaries of each distributor for the purposes of (1) verifying the reports and information furnished to the Market Administrator by each distributor, pursuant to this License, and/or (2) in the event of the failure of any distributor to furnish reports or information as required by this License, obtaining the information so required.

**SECTION F. /Establishment of Milk Industry Board.**

The Secretary may, in his discretion, at any time, establish a Milk Industry Board, which shall have representation of producers, distributors and the public. In establishing the Milk Industry Board, the Secretary will give due consideration to the recommendations, and nominations by various groups of producers, distributors and the public. The Milk Industry Board shall have such duties and powers as the Secretary may, from time to time, delegate to it in order to effectuate the provisions and purposes of this License. The Secretary may further, in his discretion, authorize and direct the Market Administrator to pay over to the Milk Industry Board for the purpose of meeting its general expenses, a portion of the moneys paid to the Market Administrator for his cost of operation pursuant to Section D of this Exhibit, providing that such portion shall in no event exceed 4th cent per hundred pounds of milk for which such payment is made.

**SECTION G. New Producers and Purchasers from Producers Without Bases.**

1. New producers shall be those producers whose milk was neither being purchased by distributors (other than those distributors specified in paragraph 13 (a) of Section A) nor being distributed in the Chicago Sales Area within 90 days prior to the effective date of the License.

Except during an emergency period as provided in paragraph 2 hereof, no such distributor shall hereafter purchase milk from any new producer unless the distributor shall first obtain a permit by making due written application to the Market Administrator upon forms supplied by said Market Administrator, authorizing him to purchase such milk. The Market Administrator shall render his decision in connection with any such application within two weeks after filing of application. The Market Administrator, in determining whether to issue such permit, shall ascertain whether its issuance will tend to prevent the effectuation of the policy of the Act or of the purpose of this License. In the event that any distributor is denied such a permit after having made such written

application to the Market Administrator, the producer or the distributor shall have the right of immediate appeal to the Secretary.

Whenever a distributor is granted a permit to purchase milk from a new producer, a base shall be allotted to such new producer by the Market Administrator in accordance with the provisions of Exhibit B.

2. During any emergency period when the normal supply of milk from producers who have bases is not sufficient to meet the Class I requirements of any distributor, such distributor may, with the prior approval of the Market Administrator, purchase during such emergency period, milk of producers who have no bases; provided, however, that in any such event, the producer selling such milk shall be paid for the same, depending upon the ultimate use of such milk and at the prices as provided for in paragraph 1, Section A, and such payments shall not be included in the computation as provided in paragraph 5, Section A, but shall be reported separately to the Market Administrator by the distributor who purchased the milk from such producer.

### **EXHIBIT B.**

#### **RULES FOR ESTABLISHMENT OF BASES**

1. For the purpose of the License, the term "established base" as used in respect to any producer, farm, or herd, as the case may be, shall mean:

(a) In the case of producers who are members of the Pure Milk Association, hereinafter called the "Association", the quantity of milk recorded as such bases in the files and records of the Association; provided that the Association has given the Market Administrator access to such files and records. All changes in the aforesaid bases shall be reported immediately to the Market Administrator. Any changes in the aforesaid bases shall not be effective until (1) reported to the Market Administrator, and (2) approved by the Market Administrator.

(b) In the case of producers who are not members of the Association, bases shall be allotted by the Market Administrator, which bases shall be equitable as compared with the bases established pursuant to subdivision (a) above. The Market Administrator shall make such revisions from time to time as he may deem advisable and necessary to the end that such bases may be equitable as among producers, and that the total of all established bases may, so far as practical, be equal to the total quantity of milk sold or used by distributors as Class I and Class II milk.

2. Every distributor shall, within ten days of the effective date of this License, submit to the Market Administrator written reports, verified under oath, containing the following information (1) with respect to each producer who has delivered milk to such distributor; and (2) for each calendar month during the years of 1933 and 1934 or such portion thereof as the producer may have delivered milk:

- (a) The total pounds of delivered milk.
- (b) The number of days on which milk was delivered.
- (c) The average percentage of butterfat in such delivered milk.
- (d) The total pounds of butterfat in such delivered milk.

3. When bases are established for producers, as hereinabove provided, the Market Administrator shall notify each distributor of the bases of the producers who are delivering milk to such distributor.

4. A producer with an established base who rents a farm as a tenant may retain his established base.

5. A tenant renting a farm may transfer his individual established base from farm to farm with the herd.

6. A landlord who rents on shares is entitled to the entire base to the exclusion of the tenant, if the landlord owns the entire herd on such farm. If the cattle are owned jointly, whether in a landlord and tenant relationship or otherwise, the base will be divided between the joint owners according to the ownership of the cattle.

7. The separate bases of any landlord and his tenant or tenants may be combined and handled as a single base. When the landlord and tenant or tenants separate, the combined bases shall be divided according to the proportion of the ownership of the herd.

8. Any producer who shall voluntarily cease to market milk for ultimate consumption as whole milk in the Chicago Sales Area for a period of more than forty-five consecutive days, shall forfeit his base. In the event that he resumes production thereafter, he shall be treated, for the purpose of these rules, as if he were a new producer.

9. Any producer may sell his base with the sale of his entire herd to one purchaser at one time, provided, however, that such base so sold or transferred shall be forfeited, unless the entire herd is maintained for six months consecutively after such sale and transfer.

10. Any producer may combine all bases to which he may be entitled hereunder.

11. Any producer whose average daily shipment for any three consecutive months, except April, May and June, is less than 75 percent of his base will thereby establish a new base equal to such average daily shipment.

12. Where a herd is dispersed for any reason without an established base having been transferred with the herd, the producer must replace the herd within 45 days if he is to retain his established base.

Docket No. 1-C

UNITED STATES DEPARTMENT OF AGRICULTURE  
AGRICULTURAL ADJUSTMENT ADMINISTRATION

LICENSE SERIES—LICENSE No. 30

AMENDMENT TO AMENDED LICENSE  
FOR MILK

CHICAGO SALES AREA

Issued by the Secretary of Agriculture, June 30, 1934.  
Effective date July 1, 1934 (12:01 a. m., eastern standard time).

AMENDMENT TO AMENDED LICENSE FOR MILK  
CHICAGO SALES AREA

LICENSE SERIES—LICENSE No. 30

WHEREAS, it is provided by section 8 of the Agricultural Adjustment Act, as amended, as follows:

"Section 8. In order to effectuate the declared policy, the Secretary of Agriculture shall have power—

"(3) To issue licenses permitting processors, associations of producers, and others to engage in the handling, in the current of interstate or foreign commerce, of any agricultural commodity or product thereof, or any competing commodity or product thereof. Such licenses shall be subject to such terms and conditions, not in conflict with existing Acts of Congress or regulations pursuant thereto, as may be necessary to eliminate unfair practices or charges that prevent or tend to prevent the effectuation of the declared policy and the restoration of normal economic conditions in the marketing of such commodities or products and the financing thereof. \* \* \*

"(4) To require any licensee under this section to furnish such reports as to quantities of agricultural commodities or products thereof bought and sold and the prices thereof, and as to trade practices and charges,

and to keep such systems of accounts, as may be necessary for the purpose of part 2 of this title"; and

WHEREAS, R. A. Wallace, Secretary of Agriculture, acting under the provisions of said Act, for the purposes and within the limitations therein contained, and pursuant to the regulations issued thereunder, has on the fifth day of February, 1934, issued a License for Milk, Chicago Sales Area; and

WHEREAS, H. G. Tugwell, Acting Secretary of Agriculture, acting under provisions of said Act for the purposes and within the limitations therein contained, and pursuant to the regulations issued thereunder, has on the 31st day of May, 1934, issued an Amended License for Milk—Chicago Sales Area (hereinafter called the "License"); and

WHEREAS, . . . . . Secretary of Agriculture, has determined to modify the terms and conditions of the License;

Now, THEREFORE, . . . . . Secretary of Agriculture, acting under the authority vested in him as aforesaid;

Hereby amends and modifies the terms and conditions of the License as follows:

1. That paragraph 1 of section A of exhibit A which appears below, be deleted from the License:

"1. Each distributor, except as hereinafter provided shall be obligated to pay, in the manner herein-after provided, the following prices for milk, of 3.5 percent butterfat content, which he has purchased from producers, delivered f. o. b. distributor's country plant, platform, or loading station located within 70 miles from the City Hall in Chicago, Illinois:

Class I—\$2.00 per hundredweight.

Class II—For each one hundred pounds of milk—to the average price per pound of 92 score butter at wholesale in the Chicago market, as reported daily by the United States Department of Agriculture for the delivery period during which such milk is purchased, add 12 cents per pound, then multiply by 3.5.

**Class III**—For each one hundred pounds of milk, 3.5 times the average price per pound of 92 score butter at wholesale in the Chicago market as reported daily by the United States Department of Agriculture, for the delivery period during which such milk is purchased, to which amount shall be added 4 cents; unless there shall be in effect a price established pursuant to an applicable Marketing Agreement and/or License, issued pursuant to the Act, for any of the products used in this classification in which event the price for such portion shall be that established by the aforementioned Agreement and/or License.

The above prices shall apply to milk purchased outside the 70 mile zone, except as provided in Section B.

The term 'delivery period' shall mean the period from the 1st to, and including, the last day of each month."

2. That the following be substituted as paragraph 1 of section A of exhibit A of the License:

"1. Each distributor, except as hereinafter provided, shall be obligated to pay, in the manner hereinafter provided, the following prices for milk, of 3.5 percent butterfat content, which he has purchased from producers, delivered f. o. b. distributor's country plant, platform, or loading station located within 70 miles from the City Hall in Chicago, Illinois:

Class I—\$2.25 per hundredweight.

Class II—For each one hundred pounds of milk—to the average price per pound of 92 score butter at wholesale in the Chicago market, as reported daily by the United States Department of Agriculture for the delivery period during which such milk is purchased, add 12 cents per pound, then multiply by 3.5.

Class III—For each one hundred pounds of milk, 3.5 times the average price per pound of 92 score butter at wholesale in the Chicago market as reported daily by the United States Department of Agriculture, for the delivery period during which such milk is purchased, to which amount shall be added 4 cents; unless there shall be in effect a price established pursuant to an applicable Marketing Agreement and/or License, issued pursuant to the Act, for any of the products used in this classification in which event the price for such portion shall be that established by the aforementioned Agreement and/or License.

The above prices shall apply to milk purchased outside the 70 mile zone, except as provided in Section B.

The term 'delivery period' shall mean the period from the 1st to, and including, the last day of each month."

3. This Amendment to the License shall become effective at such times as the Secretary may declare above his signature attached hereto.

4. The provisions of the License except as amended by this Amendment shall continue to be in full force and effect.

5. Nothing herein contained shall release or otherwise affect the liability of any licensee in respect to any violation by him prior to the effective date of this Amendment to said License.

6. The Secretary hereby determines that an emergency exists which requires a shorter period of notice than three days, and that the period of notice, with respect to the issuance of this Amendment to the License, which is hereinafter provided, is reasonable under the circumstances.

IN WITNESS WHEREOF, H. A. Wallace, Secretary of Agriculture, does hereby execute in duplicate and issue this

Amendment to the Amended License for Milk—Chicago Sales Area, in the city of Washington, District of Columbia, on this 30th day of June, 1934, and pursuant to the provisions hereof, declare the provisions of this Amendment to said Amended License to be effective on and after 12:01 a. m., eastern standard time, July 1, 1934.

H. A. WALLACE,  
*Secretary of Agriculture.*

Docket No. 1

UNITED STATES DEPARTMENT OF AGRICULTURE  
AGRICULTURAL ADJUSTMENT ADMINISTRATION

LICENSE SERIES—LICENSE No. 30

AMENDMENT TO AMENDED LICENSE

FOR MILK

CHICAGO SALES AREA

Issued by the Secretary of Agriculture, July 17, 1934.  
Effective date July 18, 1934 (12:01 a. m., eastern standard time).

AMENDMENT TO AMENDED LICENSE FOR MILK  
CHICAGO SALES AREA

LICENSE SERIES—LICENSE No. 30

WHEREAS, it is provided by section 8 of the Act as follows:

"Section 8. In order to effectuate the declared policy, the Secretary of Agriculture shall have power—

"(3) To issue licenses permitting processors, associations of producers, and others to engage in the handling, in the current of interstate or foreign commerce, of any agricultural commodity or product thereof, or any competing commodity or product thereof. Such licenses shall be subject to such terms and conditions, not in conflict with existing Acts of Congress or regulations pursuant

thereto, as may be necessary to eliminate unfair practices or charges that prevent or tend to prevent the effectuation of the declared policy and the restoration of normal economic conditions in the marketing of such commodities or products and the financing thereof \*\*\*

"(4) To require any licensee under this section to furnish such reports as to quantities of agricultural commodities or products thereof bought and sold and the prices thereof, and as to trade practices and charges, and to keep such systems of accounts, as may be necessary for the purpose of part 2 of this title"; and

WHEREAS, the Secretary, acting under the provisions of said Act, for the purposes and within the limitations therein contained, and pursuant to the regulations issued thereunder, has, on the 31st day of May, 1934, issued a License for Milk—Chicago Sales Area, as amended, (hereinafter called the License); and

WHEREAS, the Secretary of Agriculture has determined to modify the terms and conditions of the License:

Now, THEREFORE, the Secretary of Agriculture, acting under the authority vested in him as aforesaid;

Hereby amends and modifies the terms and conditions of the License as follows:

1. That paragraph 3 of part II of the License, which appears below, be deleted from the License:

"3. No distributor shall purchase milk from any producer unless such producer authorizes such distributor, with respect to payments for milk purchased from such producer, to comply with the provisions of exhibit A."

2. That the paragraphs numbered "4" to "13", inclusive, of part II be renumbered as paragraph "3" to "12", inclusive.

3. This amendment to the License shall become effective at such time as the Secretary may declare above his signature attached hereto.

4. The provisions of the License, except as amended by this amendment, shall continue to be in full force and effect.

5. Nothing herein contained shall release or otherwise

affect the liability of any licensee in respect to any violation by him prior to the effective date of this amendment to the License.

The Secretary hereby determines that an emergency exists which requires a shorter period of notice than three (3) days, and that the period of notice, with respect to the issuance of this amendment to the License, which is hereinafter provided, is reasonable under the circumstances.

IN WITNESS WHEREOF, HENRY A. WALLACE, Secretary of Agriculture of the United States, does hereby execute in duplicate, this amendment to the License for Milk—Chicago Sales Area, as amended, in the city of Washington, District of Columbia, on this 17th day of July, 1934, and pursuant to the provisions hereof, declare the provisions of this amendment to the License for Milk—Chicago Sales Area, as amended, to be effective on and after 12:01 a. m., eastern standard time, July 18, 1934.

H. A. WALLACE,  
*Secretary of Agriculture.*

Docket No. 1C

UNITED STATES DEPARTMENT OF AGRICULTURE  
AGRICULTURAL ADJUSTMENT ADMINISTRATION

LICENSE SERIES—LICENSE No. 30

AMENDMENT TO AMENDED LICENSE  
FOR MILK

CHICAGO, ILLINOIS, SALES AREA

Issued by the Acting Secretary of Agriculture, August 21, 1934. Effective date August 22, 1934 (12:01 a. m., eastern standard time).

AMENDMENT TO AMENDED LICENSE FOR MILK  
CHICAGO, ILLINOIS, SALES AREA

LICENSE SERIES—LICENSE No. 30

WHEREAS, the Secretary of Agriculture, acting under the provisions of said Act, for the purposes and within

the limitations therein contained, and pursuant to the regulations issued thereunder, has on the 3rd day of February, 1934, issued a License for Milk—Chicago Sales Area; and

WHEREAS, Rexford G. Tugwell, Acting Secretary of Agriculture, acting under the provisions of said Act, for the purposes and within the limitations therein contained, and pursuant to the regulations issued thereunder, has on the 31st day of May, 1934, issued an Amended License for Milk—Chicago Sales Area; and

WHEREAS, the Secretary of Agriculture, acting under the provisions of said Act, for the purposes and within the limitations therein contained, and pursuant to the regulations issued thereunder, has on the 30th day of June, 1934, issued an Amendment to an Amended License—Chicago Sales Area; and

WHEREAS, the Secretary of Agriculture, acting under the provisions of said Act, for the purposes and within the limitations therein contained, and pursuant to the regulations issued thereunder, has on the 17th day of July, 1934, issued an Amendment to an Amended License, as amended; and

WHEREAS, the undersigned finds that it is necessary to issue the following Amendment to the Amended License for Milk—Chicago Sales Area, as amended, pursuant to Section 8 (3) of the Agricultural Adjustment Act and applicable General Regulations of the Agricultural Adjustment Administration; and

WHEREAS, the undersigned finds that this Amendment is in accordance with the provisions of Section 8 (3) of the said Act and tends to effectuate the purposes of the said Act; and

WHEREAS, the undersigned finds that the subject matter of this Amendment is embraced within the scope of a hearing heretofore held on a Marketing Agreement pursuant to applicable General Regulations of the Agricultural Adjustment Administration:

Now, THEREFORE, the Secretary of Agriculture, acting under the authority vested in him as aforesaid;

Hereby amends and modifies the terms and conditions of the said Amended License, as amended (hereinafter called the License), as follows:

1. That paragraph 9 of section A of exhibit A of the License, which appears below, be deleted from the License:

"9. Any errors in computation of payments or any discrepancies in reports of distributors or in the adjustment accounts shall be adjusted when settlements are made with respect to the following delivery period. Whenever the Market Administrator has a balance on hand in excess of any adjustments to be made to distributors, he may distribute such balance or any part thereof in an equitable manner among producers in the market."

2. That the following be substituted as paragraph 9 of section A of exhibit A of the License:

"9. The Market Administrator may deduct, from the total amount computed pursuant to subdivision (a) of paragraph 5, an amount suitable for the maintenance of a reserve fund against the failure or delay of distributors to make payments on adjustment accounts as provided in paragraph 8. Repayments of any such deductions shall be made by the Market Administrator to the producers from whom such deductions were made in the same proportion as the original deduction. Any error in computation of payments or any discrepancies in the reports of distributors or in the adjustment accounts shall be adjusted when settlements are made with respect to the following month. All such funds shall be kept separate by the Market Administrator and shall in no event be used by him to meet any costs or liabilities incurred by him under this License."

3. That a paragraph numbered 14, which appears below, be added to section A of exhibit A of the License:

"14. No distributor shall sell milk to or purchase milk from another distributor for Class I purposes at less than the Class I price specified in paragraph 1, subject to adjustments as provided in section B of this exhibit. If the selling distributor pasteurizes, bottles, or otherwise processes or transports such milk, which results in a service to the buying distributor, a reasonable charge and/or payment as the case may be, shall be made therefor. Any contract or agreement entered into between one distributor and another dis-

tributor, prior to the effective date of this License, covering the purchase and/or delivery of such milk, shall be deemed to be superseded by the terms and provisions of this License insofar as such contract or agreement is inconsistent with any provisions hereof."

4. This Amendment to the License shall become effective at such time as the Secretary may declare above his signature attached hereto.

5. The provisions of the License, except as amended by this Amendment, shall continue to be in full force and effect.

6. Nothing herein contained shall release or otherwise affect the liability of any licensee in respect to any violation by him prior to the effective date of this Amendment to the License.

7. The Secretary hereby determines that an emergency exists which requires a shorter period of notice than three (3) days, and that the period of notice, with respect to the issuance of this Amendment to the License, which is hereinafter provided, is reasonable under the circumstances.

IN WITNESS WHEREOF, R. G. Tugwell, Acting Secretary of Agriculture of the United States, does hereby execute in duplicate, this Amendment to the Amended License for Milk—Chicago Sales Area, as amended, in the City of Washington, District of Columbia, on this 21st day of August, 1934, and pursuant to the provisions hereof, declare the provisions of this Amendment to the Amended License for Milk—Chicago Sales Area, as amended, to be effective on and after 12:01 a.m., eastern standard time, August 22, 1934.

R. G. TUGWELL,  
*Acting Secretary of Agriculture.*

Docket No. 10

UNITED STATES DEPARTMENT OF AGRICULTURE  
AGRICULTURAL ADJUSTMENT ADMINISTRATION

LICENSE SERIES—LICENSE No. 30

AMENDMENT TO AMENDED LICENSE  
FOR MILK

CHICAGO, ILLINOIS, SALES AREA

Issued by the Acting Secretary of Agriculture, October 30, 1934. Effective date November 1, 1934 (12:01 a. m., eastern standard time).

AMENDMENT TO AMENDED LICENSE FOR MILK  
CHICAGO, ILLINOIS, SALES AREA

WHEREAS, H. A. Wallace, Secretary of Agriculture, acting under the provisions of the Agricultural Adjustment Act, as amended, for the purposes and within the limitations therein contained, and pursuant to the regulations issued thereunder, has, on the 3rd day of February, 1934, issued a License for Milk—Chicago Sales Area; and

WHEREAS, R. G. Tugwell, Acting Secretary of Agriculture, acting under the provisions of said Act, for the purposes and within the limitations therein contained, and pursuant to the regulations issued thereunder, has, on the 31st day of May, 1934, issued an Amended License for Milk—Chicago Sales Area; and

WHEREAS, H. A. Wallace, Secretary of Agriculture, acting under the provisions of said Act, for the purposes and within the limitations therein contained, and pursuant to the regulations issued thereunder, has, on the 30th day of June, 1934, issued an Amendment to the Amended License for Milk—Chicago Sales Area; and

WHEREAS, H. A. Wallace, Secretary of Agriculture, acting under the provisions of said Act, for the purposes and within the limitations therein contained, and pursuant to the regulations issued thereunder, has, on the 17th day

of July, 1934, issued an Amendment to the Amended License for Milk—Chicago Sales Area, as amended; and

WHEREAS, R. G. Tugwell, Acting Secretary of Agriculture, acting under the provisions of said Act, for the purposes and within the limitations therein contained, and pursuant to the regulations issued thereunder, has, on the 21st day of August, 1934, issued an Amendment to the Amended License for Milk—Chicago Sales Area, as amended; and

WHEREAS, the undersigned finds that it is necessary to issue the following Amendment to the Amended License for Milk—Chicago Sales Area, as amended, pursuant to Section 8 (3) of the Agricultural Adjustment Act, and applicable General Regulations of the Agricultural Adjustment Administration; and

WHEREAS, the undersigned finds that this Amendment is in accordance with the provisions of Section 8 (3) of the said Act and tends to effectuate the purposes of the said Act; and

WHEREAS, the undersigned finds that the subject matter of this Amendment is embraced within the scope of a hearing heretofore held on a Marketing Agreement pursuant to applicable General Regulations of the Agricultural Adjustment Administration:

Now, THEREFORE, the undersigned, acting under the authority vested in him as aforesaid,

Hereby amends and modifies the terms and conditions of the said Amended License, as amended (hereinafter called the License), as follows:

1. That paragraph 1 of section A of exhibit A which appears below, be deleted from the License:

"1. Each distributor, except as hereinafter provided, shall be obligated to pay, in the manner hereinafter provided, the following prices for milk, of 3.5 per cent butterfat content, which he has purchased from producers, delivered f. o. b. distributor's country plant, platform, or loading station located within 70 miles from the City Hall in Chicago, Illinois:

Class I—\$2.25 per hundredweight.

Class II—For each one hundred pounds of milk—to the average price per pound of 92

score butter at wholesale in the Chicago market, as reported daily by the United States Department of Agriculture, for the delivery period during which such milk is purchased, add 12 cents per pound, then multiply by 3.5.

**Class III**—For each one hundred pounds of milk, 3.5 times the average price per pound of 92 score butter at wholesale in the Chicago market as reported daily by the United States Department of Agriculture, for the delivery period during which such milk is purchased, to which amount shall be added 4 cents; unless there shall be in effect a price established pursuant to an applicable Marketing Agreement and/or License, issued pursuant to the Act, for any of the products used in this classification in which event the price for such portion shall be that established by the aforementioned Agreement and/or License.

The above prices shall apply to milk purchased outside the 70 mile zone, except as provided in section B.

The term 'delivery period' shall mean the period from the 1st to, and including, the last day of each month."

2. That the following be substituted as paragraph 1 of section A of exhibit A of the License:

"*1e* Each distributor, except as hereinafter provided, shall be obligated to pay, in the manner herein-after provided, the following prices for milk, of 3.5 per cent butterfat content, which he has purchased from producers, delivered f. o. b. distributor's country plant, platform, or loading station located within 70 miles from the City Hall in Chicago, Illinois:

Class I—\$2.00 per hundred weight.

Class II—For each one hundred pounds of milk—  
to the average price per pound of 92  
score butter at wholesale in the Chicago

market, as reported daily by the United States Department of Agriculture for the delivery period during which such milk is purchased, add 10 cents per pound, then multiply by 3.5.

**Class III**—For each one hundred pounds of milk, 3.5 times the average price per pound of 92 score butter at wholesale in the Chicago market as reported daily by the United States Department of Agriculture, for the delivery period during which such milk is purchased, to which amount shall be added 4 cents; unless there shall be in effect a price established pursuant to an applicable Marketing Agreement and/or License, issued pursuant to the Act, for any of the products used in this classification in which event the price for such portion shall be that established by the aforementioned Agreement and/or License.

The above prices shall apply to milk purchased outside the 70 mile zone, except as provided in section B.

The term 'delivery period' shall mean the period from the 1st to, and including, the last day of each month."

3. This Amendment to the License shall become effective at such time as the Secretary may declare above his signature attached hereto.

4. The provisions of the License except as amended by this Amendment shall continue to be in full force and effect.

5. Nothing herein contained shall release or otherwise affect the liability of any licensee in respect to any violation by him prior to the effective date of this Amendment to said License.

6. The Secretary hereby determines that an emergency exists which requires a shorter period of notice than three days, and that the period of notice, with respect to the issuance of this Amendment to the License, which is hereinafter provided, is reasonable under the circumstances.

IN WITNESS WHEREOF, M. L. Wilson, Acting Secretary of Agriculture, does hereby execute in duplicate and issue this Amendment to the Amended License for Milk—Chicago Sales Area, as amended, in the City of Washington, District of Columbia, on this 30th day of October, 1934, and pursuant to the provisions hereof, declare the provisions of this amendment to said Amended License to be effective on and after 12:01 a. m., eastern standard time, November 1, 1934.

M. L. Wilson,  
*Acting Secretary of Agriculture.*

Docket No.—1  
License No.—30

UNITED STATES DEPARTMENT OF AGRICULTURE  
AGRICULTURAL ADJUSTMENT ADMINISTRATION

LICENSE SERIES—LICENSE No. 30

AMENDED LICENSE

FOR MILK

CHICAGO, ILLINOIS, SALES AREA

WITH

EXHIBIT A

ALLOTMENT AND REGULATION OF BASES

Issued by the Secretary of Agriculture, December 1, 1934.  
Effective date December 2, 1934 (12:01 a. m., eastern standard time).

AMENDED LICENSE FOR MILK  
CHICAGO, ILLINOIS, SALES AREA

ARTICLE I—PREAMBLE

WHEREAS, section 8 of the Agricultural Adjustment Act, as amended, provides as follows:

"Sec. 8. In order to effectuate the declared policy, the Secretary of Agriculture shall have power—\*\*\*

"(3) To issue licenses permitting processors, associations of producers, and others to engage in the handling, in the current of interstate or foreign commerce, of any agricultural commodity or product thereof, or any competing commodity or product thereof. Such licenses shall be subject to such terms and conditions, not in conflict with existing Acts of Congress or regulations pursuant thereto, as may be necessary to eliminate unfair practices or charges that prevent or tend to prevent the effectuation of the declared policy and the restoration of normal economic conditions in the marketing of such commodities or products and the financing thereof. \*\*\*"

"(4) To require any licensee under this section to furnish such reports as to quantities of agricultural commodities or products thereof bought and sold and the prices thereof, and as to trade practices and charges, and to keep such systems of accounts, as may be necessary for the purpose of part 2 of this title. \*\*\*"

and

WHEREAS, the Secretary of Agriculture, acting under the provisions of said Act, for the purposes and within the limitations therein contained, and pursuant to the regulations issued thereunder, has on the 3rd day of February, 1934, issued a License for Milk—Chicago Sales Area; and

WHEREAS, R. G. Tugwell, Acting Secretary of Agriculture, acting under the provisions of said Act, for the purposes and within the limitations therein contained, and pursuant to the regulations issued thereunder, has on the 31st day of May, 1934, issued an Amended License for Milk—Chicago Sales Area; and

WHEREAS, the Secretary of Agriculture, acting under the provisions of said Act, for the purposes and within the limitations therein contained, and pursuant to the regulations issued thereunder, has on the 30th day of June, 1934, issued an Amendment to Amended License for Milk—Chicago Sales Area; and

WHEREAS, the Secretary of Agriculture, acting under the provisions of said Act, for the purposes and within the limi-

tations therein contained, and pursuant to the regulations issued thereunder, has on the 17th day of July, 1934, issued an Amendment to the Amended License for Milk—Chicago Sales Area; and

WHEREAS, R. G. Tugwell, Acting Secretary of Agriculture, acting under the provisions of said Act, for the purposes and within the limitations therein contained, and pursuant to the regulations issued thiereunder, has on the 21st day of August, 1934, issued an Amendment to the Amended License for Milk—Chicago Sales Area; and

WHEREAS, M. L. Wilson, Acting Secretary of Agriculture, acting under the provisions of said Act, for the purposes and within the limitations therein contained, and pursuant to the regulations issued thereunder, has on the 30th day of October, 1934, issued an amendment to the Amended License for Milk—Chicago Sales Area; and

WHEREAS, the undersigned finds that the marketing, distribution and handling of milk and the products thereof, covered by this License, are in the current of interstate commerce since the portion theréof which occurs within the bounds of a single State affects and actually and potentially competes with the marketing, distribution and handling of commodities and products which occur between or among several States, and since the commodity, and the products thereof, covered by this License cannot be separated into interstate and intrastate portions, the supply and the marketing, distribution and handling thereof being inextricably commingled, so that it is impossible to regulate the interstate marketing, distribution and handling without also regulating the intrastate marketing, distribution and handling, and the failure to regulate the latter will defeat and obstruct the purposes of the Act with respect to the former; and

WHEREAS, the undersigned has determined to modify the terms and conditions of the said Amended License for Milk—Chicago Sales Area, pursuant to section 8 (3) of the Agricultural Adjustment Act, as amended, and applicable General Regulations of the Agricultural Adjustment Administration; and

WHEREAS, the undersigned finds that this Amended License and the terms and conditions hereof are in accord-

ance with the provisions of section 8 (3) of the said Act and tend to effectuate the purposes of the Act; and

WHEREAS, the undersigned finds that the subject matter of this Amended License is embraced within the scope of a hearing heretofore held on a Marketing Agreement pursuant to applicable General Regulations of the Agricultural Adjustment Administration:

Now, THEREFORE, the undersigned, acting under the authority vested in him as aforesaid:

Hereby amends and modifies the terms and conditions of the said License and hereby licenses each and every distributor to engage in the business of marketing, distributing or handling milk or cream as a distributor in the Chicago Sales Area, subject to the terms and conditions set forth in this Amended License, hereinafter called the "License."

#### ARTICLE II—DEFINITIONS.

SECTION 1. *Definitions of Terms.* As used in this License, the following words and phrases shall be defined as follows:

1. "Act" means the Agricultural Adjustment Act approved May 12, 1933, as amended.
2. "Secretary" means the Secretary of Agriculture of the United States.
3. "Chicago Sales Area", hereinafter called the "Sales Area", means and includes the city of Chicago and all of that territory lying within the boundaries of Cook County, Lake County and DuPage County, State of Illinois; the townships of Dundee, Elgin, St. Charles, Geneva, Batavia and Aurora, in Kane County, State of Illinois; the township of Oswego in Kendall County, State of Illinois; the townships of Wheatland, DuPage, Plainfield, Lockport, Homer, Troy, Joliet, New Lenox, Frankfort and Crete in Will County, State of Illinois; and the townships of St. John, Ross, North, Calumet, and Hobart in Lake County, State of Indiana.
4. "Person" means any individual, partnership, corporation, association or other business unit.
5. "Producer" means any person, irrespective of whether any such person is also a distributor, who pro-

duces milk in conformity with the applicable health requirements in force and effect within the Sales Area for milk to be sold for consumption as whole milk or cream in the Sales Area.

6. "New Producer" means (1) a producer whose milk was neither being purchased by distributors nor being distributed in the Sales Area within ninety (90) days prior to the effective date of this License, or (2) a producer who has ceased to market milk pursuant to the terms and provisions of this License for a period of forty-five (45) consecutive days or more, and thereafter markets milk pursuant to the terms and provisions of this License.

7. "Distributor" means any of the following persons, (irrespective of whether any of such persons is a producer or an association of producers), wherever located or operating, whether within or without the Sales Area, engaged in the business of distributing, marketing, or in any manner handling whole milk or cream, in whole or in part, for ultimate consumption in the Sales Area:

(a) who pasteurize, bottle or process milk or cream;

(b) who distribute milk or cream at wholesale or retail to (1) hotels, restaurants, stores or other establishments for consumption on the premises; (2) stores or other establishments for resale; and (3) consumers;

(c) who operate stores or other establishments selling milk or cream at retail for consumption off the premises;

(d) who purchase, market or handle milk or cream which is sold for resale in the Sales Area.

8. "Subsidiary" means any person of, or over whom or which, a distributor or an affiliate of a distributor has, or several distributors collectively have, either directly or indirectly, actual or legal control, whether by stock ownership or in any other manner.

9. "Affiliate" means any person and/or any subsidiary thereof, who or which has, either directly or indirectly, actual or legal control of or over a distributor, whether by stock ownership or in any other manner.

10. "Books and records" means books, records, accounts, contracts, memoranda, documents, papers, correspondence or other data pertaining to the business of the person in question.
11. "Market Administrator" means the person designated pursuant to article III.
12. "Delivery period" means the period from the first to, and including, the last day of each month.
13. "Established base", for each producer, including new producers, means that quantity of milk allotted to such producer in accordance with the provisions of exhibit A, which is attached hereto and made a part hereof.
14. "Class I percentage" means such a percentage of the total established bases as the Market Administrator shall determine at intervals of once for every three months, by dividing the average monthly sales of Class I milk for the preceding three months by the total established bases of the market. The Market Administrator may increase or reduce this percentage sufficiently to allow for minor variations in Class I milk.
15. "Class II percentage" means such a percentage of the total established bases as the Market Administrator shall determine at intervals of once for every three months by dividing the average monthly sales of Class II milk for the preceding three months by the total established bases of the market. The Market Administrator may increase or reduce this percentage sufficiently to allow for minor variations in Class II milk.
16. "Class I percentage base" means for each producer, including new producers, the established base of that producer multiplied by the Class I percentage.
17. "Class II percentage base" means for each producer, including new producers, the established base of that producer multiplied by the Class II percentage.
18. "Delivered Class I percentage base" means for each producer, including new producers, that quantity of milk delivered by such producer to distributors which is not in excess of the Class I percentage base of such producer.
19. "Delivered Class II percentage base" means for

each producer, including new producers, that quantity of milk delivered by such producer to distributors which is in excess of such producer's Class I percentage base but which is not in excess of the combined Class I and Class II percentage bases of such producer.

### ARTICLE III—MARKET ADMINISTRATOR.

**Section 1. Designation, Removal, Bond and Liability.** The Market Administrator shall be designated, and shall be subject to removal at any time, by the Secretary. The Market Administrator, within forty-five (45) days following the date upon which he enters upon his duties, shall execute and deliver to the Secretary a bond in such amount as the Secretary may determine, with surety thereon satisfactory to the Secretary, conditioned upon the faithful performance of the duties of such Market Administrator. The Market Administrator shall not be held personally responsible in any way whatsoever to any licensee or to any other person for errors in judgment, mistakes of fact or other acts, either of commission or omission, except for acts of dishonesty, fraud or malfeasance in office.

**Sec. 2. Duties.** The Market Administrator shall:

1. Perform such duties as may be provided for him pursuant to this License and amendments thereto.
2. Keep such books and records as will clearly reflect the financial transactions provided for in this License, which books and records shall be subject to examination by the Secretary at any and all times.
3. Furnish such information and such verified reports as the Secretary may, from time to time, request.
4. Obtain a bond with reasonable security thereon for each employee who handles funds entrusted to the Market Administrator under the provisions of this License.

**Sec. 3. Rights.** The Market Administrator shall have the right:

1. To borrow money for the purpose of establishing an office with the necessary equipment and supplies, and for the purpose of meeting current operating expenses during not to exceed two delivery periods; which monies

shall be repaid from the funds retained by the Market Administrator to meet his cost of operation.

2. To incur necessary expenses, including compensation for persons employed by the Market Administrator for the proper conduct of his duties, and including the cost of procuring and continuing his bond.

3. To examine the books and records of the distributors and the books and records of the affiliates and subsidiaries of each distributor for the purpose of (1) verifying the reports and information furnished to the Market Administrator by each distributor pursuant to this License, and/or (2) obtaining the information from any distributor in the event such distributor fails to furnish reports or information as required by this License.

4. To check the sampling, weighing and butterfat tests of milk made by distributors, to determine the accuracy thereof, and for the purpose of assuring proper payments to producers. In the event of a discrepancy between the weights and tests determined by the Market Administrator, and the weights and tests determined by the distributors, settlement shall be made by distributors upon the basis of such weights and such butterfat tests as the Market Administrator may in each case decide.

5. And the power, upon the specific approval of the Secretary, to institute legal proceedings in his own name, as Market Administrator, and to take any other steps which may be necessary, to collect any and all monies which may become due and owing to him as such Market Administrator and to enforce such obligations as accrue to him as such Market Administrator under the terms and provisions of this License.

Sec. 4. *Compensation.* The Market Administrator shall be entitled to reasonable compensation, which shall be determined by the Secretary.

#### ARTICLE IV—CLASSIFICATION OF MILK SALES AND USES

Section 1. *Primary Sales and Uses.* Milk purchased or handled by distributors shall be classified according to its sale and use as follows:

1. Class I milk means all milk sold or distributed by

distributors as whole milk for consumption or use in the Sales Area.

2. Class II milk means all milk used by distributors to produce cream for sale or distribution by distributors as cream for consumption or use in the Sales Area.

3. Class III milk means that quantity of milk or milk equivalent:

- (a) used by distributors to produce ice cream, ice cream mix, condensed or evaporated milk.
- (b) sold by distributors to produce ice cream or ice cream mix.

4. Class IV milk means the quantity of milk purchased, sold, used or distributed by distributors in excess of Class I, Class II and Class III milk.

Sec. 2. *Classification of Sales to Other Distributors.* Milk sold or distributed as milk or cream to another distributor, whether within or without the Sales Area, shall be accounted for by such selling distributor according to the class in which such milk or cream is sold or used by the purchasing distributor. Any distributor purchasing milk and/or cream from another distributor shall, on or before the date fixed for filing reports with the Market Administrator pursuant to article VI, furnish to the distributor from whom he purchased such milk and/or cream, an affidavit as to the quantity of milk and/or cream sold, used or distributed in each of the classes defined in section 1 of this article.

Sec. 3. *Sales Outside the Sales Area.* Milk sold or distributed by a distributor as milk or cream outside the Sales Area, shall be accounted for by such selling distributor as Class I and Class II milk, respectively: *Provided*, That if such selling distributor, on or before the date fixed for filing reports pursuant to article VI, shall furnish to the Market Administrator satisfactory proof that such milk or cream has been utilized for a purpose other than the sale or distribution for ultimate consumption or use as milk or cream, then, and in that event such milk or cream shall be classified in accordance with such other use.

Sec. 4. *Limitation as to Purchases from Producers with-*

*out bases.* No distributor shall purchase milk or cream, for Class I or Class II purposes, produced by producers without bases, unless sufficient milk to meet all his Class I requirements, and sufficient milk or cream to meet his Class II requirements up to a quantity of milk or milk equivalent equal to 35 percent of his Class I milk, is not tendered by producers with bases or by distributors purchasing only from producers with bases.

#### ARTICLE V—PRICES TO DISTRIBUTORS AND CONDITIONS OF SALES

Section 1. *Prices.* Each distributor, except as herein-after provided, shall be obligated to pay, in the manner hereinafter set forth in this License, the following prices for milk, of 3.5 percent butterfat content, which he has purchased from producers (including new producers), delivered f. o. b. distributor's country plant, platform, or loading station:

1. Class I milk—\$2.00 per hundredweight.
2. Class II milk—For each one hundred pounds of milk—to the average price per pound of 92 score butter at wholesale in the Chicago market, as reported daily by the United States Department of Agriculture for the delivery period during which such milk is purchased, add 10 cents per pound, then multiply by 3.5.
3. Class III milk—For each one hundred pounds of milk—to the average price per pound of 92 score butter at wholesale in the Chicago market, as reported by the United States Department of Agriculture for the delivery period during which such milk is purchased, add 8 cents per pound, then multiply by 3.5.
4. Class IV milk—For each one hundred pounds of milk—3.5 times the average price per pound of 92 score butter at wholesale in the Chicago market as

reported daily by the United States Department of Agriculture, for the delivery period during which such milk is purchased, to which amount shall be added 4 cents.

**Sec. 2. Adjustments in Cost of Milk to Distributors.** The prices set forth in section 1 of this article shall be subject to adjustment in accordance with the following:

1. If any producer has delivered milk to a distributor, at a country plant, platform, or loading station located more than 70 miles from the City Hall in Chicago, there shall be a deduction with respect to his Class I milk of 1 cent per hundredweight for each 10 miles or part thereof in excess of 70 miles, but not in excess of 100 miles from the City Hall in Chicago, and 1 cent per hundredweight for each 15 miles or part thereof in excess of 100 miles from the City Hall in Chicago.

2. Unless the prior written consent of the Market Administrator is obtained to compute the adjustments in the cost of milk to distributors made pursuant to this section, on some other basis, such adjustments shall be computed on the basis that to the extent necessary to supply each distributor with milk sold, distributed or used by him as Class I milk, the milk which was delivered to him at locations in or nearest to the Sales Area was sold, distributed or used by him as Class I milk.

3. On Class I, Class II and Class III milk sold, distributed or used outside of the Sales Area, there shall be an adjustment by (1) the amount of the difference between the Class I, Class II and Class III prices, respectively, specified in section 1, and such prices as the Market Administrator may determine to be the market prices in the market where such milk or cream is sold, distributed or used, and (2) the reasonable cost of transportation from the plant of origin of such milk or cream to such market.

**Sec. 3. Other Licenses for Milk.** If any milk is purchased from producers pursuant to the terms and conditions of this License and sold as milk or cream for ultimate consumption in another market with respect to which a License is in effect pursuant to section 8 (3) of

the Act covering such purchase from producers and such sales as milk or cream, then, and in that event the License in effect in the area in which such milk or cream is sold for ultimate consumption shall govern the prices and conditions of such sale.

**Sec. 4. Transactions with Violators.** No distributor shall purchase milk or cream from, or process or distribute milk or cream for, or sell milk or cream to any other distributor who he has notice is violating any provision of this License. Notice in writing from the Market Administrator shall be deemed to be sufficient notice.

**Sec. 5. Purchases by Distributors from Other Distributors.** No distributor shall sell milk or cream to or purchase milk or cream from another distributor for Class I or Class II purposes at less than the respective Class I or Class II prices specified in section 1, subject to adjustments as provided in section 2. If the selling distributor pasteurizes, bottles, or otherwise processes or transports such milk or cream as a service to the buying distributor, a reasonable charge or payment, as the case may be, shall be made therefor.

**Sec. 6. Prior Contracts.** Any contract or agreement entered into by a distributor prior to the effective date of this License, covering the purchase, delivery and/or sale of milk and its products, shall be deemed to be superseded by the terms and provisions of this License in so far as such contract or agreement is inconsistent with any provision of this License.

#### **ARTICLE VI—REPORTS OF RECEIPTS AND SALES OF MILK BY DISTRIBUTORS**

**Section 1.** On or before the 7th day after the end of each delivery period, each distributor (other than those who operate only stores or similar establishments) shall report to the Market Administrator in a manner prescribed by the Market Administrator, with respect to milk or cream received by such distributor, during such delivery period, as follows:

1. The deliveries to each plant from producers supplying such distributor, the total quantity of milk represented by the delivered Class I percentage bases of all such

producers, the total quantity of milk represented by the delivered Class II percentage bases of all such producers, and the total quantity of milk represented by the excesses over the delivered Class I and Class II percentage bases of all such producers; and the deliveries of new producers supplying such distributor.

2. The total quantities of milk which were sold, used, or distributed by such distributor as Class I, Class II, Class III and Class IV milk, respectively, including sales to other distributors.

3. The deliveries of milk made to such distributor by any other distributor.

4. Upon first receiving milk from any producer (1) the name of such producer, (2) the date on which such milk was first received, and (3) whether or not such producer is a new producer.

5. Such other information as the Market Administrator may request for the purpose of performing the provisions of this License.

#### ARTICLE VII—DISTRIBUTORS NOT MARKETING WHOLE MILK

Section 1. *Distributors Not Marketing Whole Milk.* Any distributor who does not sell or distribute whole milk for ultimate consumption or use in the Sales Area, and who does not purchase milk from producers with bases:

1. Shall pay to producers the Class II price set forth in section 1 of article V for the milk purchased by him which is used to produce cream sold or distributed by him for ultimate consumption in the Sales Area;

2. Shall not be subject to the terms and provisions of articles VIII, IX, X, XII and XIII; but shall submit any or all reports pursuant to article VI upon the request of the Market Administrator.

#### ARTICLE VIII—DETERMINATION AND NOTIFICATION OF PRICES TO PRODUCERS

Section 1. *Computations.* With respect to each delivery period, the Market Administrator shall:

1. Compute the total value of the milk reported by each and all distributors pursuant to article VI on the

basis of the classification and prices with adjustments as set forth in articles IV and V, respectively, which computations shall not include the milk or the value thereof as purchased by distributors from other distributors, or if classified as emergency milk pursuant to section 3 of article IX.

2. Compute the total adjusted value of all the milk, the total value of which is computed in paragraph 1, by adding to such total value the adjustments to be made pursuant to section 5 of article IX.

3. Compute the total quantities of milk which represent, respectively, (1) the total of delivered Class I percentage bases, (2) the total of delivered Class II percentage bases and, (3) the total deliveries in excess of the delivered Class I and Class II percentage bases, all of which quantities are included in the computations made pursuant to paragraph 1.

4. Compute the value of the quantity of milk represented by the total Class I delivered percentage bases by multiplying such quantity of milk by the price specified for Class I milk in section 1 of article V.

5. Compute the value of the quantity of milk delivered in excess of the total delivered Class I and Class II percentage bases by multiplying such quantity of milk by the price specified for Class IV milk in section 1 of article V.

6. Compute the total value of the quantity of milk represented by the total delivered Class II percentage bases by subtracting from the amount obtained in paragraph 2 the amounts obtained in paragraphs 4 and 5.

7. Compute the blended price per hundredweight for the quantity of milk represented by the delivered Class II percentage bases by dividing the amount obtained in paragraph 6 by the quantity of milk represented by the total delivered Class II percentage bases, which blended price shall be subject to adjustments as set forth in section 2 of this article.

Sec. 2. *Adjustments for Reserves.* The Market Administrator may adjust the blended price, computed pursuant to section 1 of this article, for the purpose of establishing and maintaining a reserve fund against (1) the failure or delay of distributors to make payments on equaliza-

tion accounts pursuant to section 2 of article X, (2) errors and discrepancies in reports of distributors, and (3) errors and discrepancies in equalization accounts, including adjustments on delayed reports of distributors: *Provided*, That such adjustments in the blended price for any one delivery period may not, except upon the specific approval of the Secretary, exceed an amount equal to two (2) per cent of the total value of milk reported by distributors for such delivery period. Such reserve fund shall at no time contain a net amount in excess of ten (10) per cent of the value of the milk reported by distributors for an average delivery period and shall in no event be used by the Market Administrator to meet any costs or liabilities incurred by him under this License. If and when all or any portion of said reserve fund is not necessary to accomplish the purpose for which it was created, equitable distribution thereof shall be made by the Market Administrator to the producers supplying milk for distribution in the Sales Area.

Sec. 3. *Notification of Prices.* On or before the 12th day after the end of each delivery period, the Market Administrator shall notify all distributors, whose reports are included in the computations made pursuant to section 1 of this article, of the blended price computed pursuant to section 1 of this article, as adjusted pursuant to section 2 of this article, and of the Class II, Class III and Class IV prices as calculated by him pursuant to formulae set forth in section 1 of article V.

#### ARTICLE IX—PAYMENTS TO PRODUCERS

##### Section 1. *Payments to Producers and New Producers.*

Each distributor shall pay to producers (including new producers) on or before the 18th day after the end of each delivery period for milk delivered by such producers during such delivery period subject to adjustments as set forth in this article and deductions as set forth in article XII:

1. The Class I price for the quantity of milk delivered by each producer represented by such producer's delivered Class I percentage base.
2. The adjusted blended price, announced pursuant to

section 3 of article VIII, for the quantity of milk delivered by each producer represented by such producer's delivered Class II percentage base.

3. The Class IV price for the quantity of milk delivered by each producer in excess of such producer's delivered Class I and Class II percentage bases.

Sec. 2. *Additional Payments.* Any distributor may, with the prior approval of the Market Administrator, make payments to producers in addition to the payments pursuant to section 1 of this article: *Provided*, That such additional payments are made to all the producers supplying such distributor with milk of similar quality and grade. No distributor may accept services from, or render services to a producer or an association of producers from whom he is purchasing milk without making a reasonable payment or charge, as the case may be, for such services.

Sec. 3. *Emergency Milk.* During any emergency period when the normal supply of milk from producers is not sufficient to meet the Class I and Class II requirements of any distributor, such distributor may, with the prior approval of the Market Administrator, purchase milk for such emergency purposes from producers on terms and conditions other than those set forth in this article and in article XII, but at prices not less than the equivalent of the prices set forth in article V, in which event such milk shall not be included in the computations as provided in article VIII, but shall be reported separately to the Market Administrator by such distributor.

Sec. 4. *Butterfat Differentials.* Each distributor shall pay an amount per hundredweight of milk for each 1/10th of one percent butterfat content above, and shall deduct a similar amount for each 1/10th of one percent butterfat content below 3.5 percent butterfat on all milk on which prices are paid producers pursuant to sections 1 and 2 of this article, as follows:

1. On delivered Class I and Class II percentage bases, four (4) cents per hundredweight, and,

2. On all milk delivered in excess of delivered Class I and Class II percentage bases, an amount per hundredweight equal to 1/10th of the average price per pound of

92 score butter at wholesale in the Chicago market as reported by the United States Department of Agriculture for the delivery period during which such milk is purchased.

**Sec. 5. Location Adjustments in Payments to Producers.** With respect to the delivered Class I percentage base of any producer who has delivered milk to a distributor at a country plant, platform or loading station located more than 70 miles from the City Hall in Chicago, each distributor shall deduct from payments to producers to be made pursuant to section 1 of this article, one (1) cent per hundredweight for each ten (10) miles or part thereof in excess of seventy (70) miles, but not in excess of one hundred (100) miles from the City Hall in Chicago; and one (1) cent per hundredweight for each fifteen (15) miles or part thereof in excess of one hundred (100) miles from the City Hall in Chicago.

**Sec. 6. Distributors' Reports of Payments.** On or before the 20th day after the end of each delivery period, each distributor shall report for such delivery period to the Market Administrator, in a manner prescribed by him, with respect to each producer: (1) his name, (2) his total deliveries of milk as delivered Class I percentage base, delivered Class II percentage base, and excess, respectively, (3) the average butterfat content of milk delivered, (4) the total payment made to such producer, showing all adjustments, additions and deductions, and (5) such other similar information as the Market Administrator shall request.

#### ARTICLE X—EQUALIZATION AMONG DISTRIBUTORS AS TO PAYMENTS TO PRODUCERS

**Section 1. Equalization Accounts.** The Market Administrator shall maintain for each distributor whose reports are included in the computations made pursuant to article VIII, records and accounts which shall accurately disclose for each distributor (1) a debit of the total value of milk as computed for each distributor pursuant to paragraph 1, section 1 of article VIII, (2) a credit of the total payments to be made by such distributor pursuant to section 1 of article IX, after giving effect to the adjustments pursuant to section 5 of article IX, and (3) the pay-

ments to be made by such distributor to the Market Administrator and payments to be made by the Market Administrator to such distributor.

**Sec. 2. Statement to Distributors and Payment of Balances.** On or before the 14th day after the end of each delivery period the Market Administrator shall render a statement to each distributor whose reports are included in the computations made pursuant to article VIII, showing the debit or credit balance, as the case may be, in the equalization account of such distributor with respect to milk purchased, sold or used during such delivery period. Debit balances shall be paid to the Market Administrator on or before the 16th day after the end of such delivery period. Any funds so paid to the Market Administrator shall, as soon as reasonably possible be paid out by him pro rata among the distributors having credit balances in proportion to, but only to the extent of, each such credit balance.

#### ARTICLE XI—PRODUCERS AND PRODUCERS' COOPERATIVE ASSOCIATIONS

**Section 1. Payments by Cooperatives.** No provision in this License shall be construed as controlling or restricting any producers' cooperative association which meets the requirements of the Capper-Volstead Act and is licensed as a distributor under this License, with respect to the actual deductions or charges, dividends or premiums to be made by such association from and/or to its members: *Provided*, That no such deductions or charges may be made by any such producers' cooperative association from any of its members, to meet a current operating loss incurred by such producers' cooperative association in its processing or distribution operations unless (a) expressly and specifically authorized by any such member to make such deductions or charges for such purpose, and (b) the producers' cooperative association notifies the Market Administrator of the same.

**Sec. 2. Transportation Rights.** Producers shall have the right to deliver milk to plants or platforms of distributors, using any reasonable method of transportation which they, in their discretion, may select. No distributor shall interfere with or discriminate against producers in

the exercise of such right. At the request of the Market Administrator, each distributor shall from time to time, submit a verified report stating the actual transportation charges on all milk delivered to him f. o. b. any and all plants, for the purpose of permitting the Market Administrator to review such transportation charges and to determine the reasonableness thereof.

#### ARTICLE XII—DEDUCTIONS FROM PAYMENTS TO PRODUCERS

Section 1. *For Market Administration.* Each distributor shall deduct one (1) cent per hundredweight from the payments to be made by him pursuant to article IX in regard to all milk delivered to him during each delivery period by producers and shall on or before the 18th day after the end of each such delivery period, pay such deduction to the Market Administrator.

Sec. 2. *For Marketing Services.* Upon the request of the Market Administrator each distributor shall, in addition, deduct three (3) cents per hundredweight from the payments to be made by such distributor pursuant to article IX in regard to all milk delivered to him during each delivery period by producers (1) for whom the following services are not currently rendered in a satisfactory manner by a producers' cooperative association: (a) market information, (b) supervision over weights and tests, and (c) to the extent that funds permit, the establishment and maintenance of a reserve fund for the protection against the failure of distributors to make payments for milk purchased; and (2) from whom a substantially similar charge or deduction is not being paid by distributors to a producers' cooperative association for such purposes. Such deductions shall be paid to the Market Administrator on or before the 18th day after the end of each delivery period and shall be expended by him for the purpose of securing services similar to those above named for producers from whose payments such deductions are made except that with the approval of the Secretary, the Market Administrator may notify any producer when the distributor to whom such producer is selling milk is in violation of any of the terms and provisions of this License, and no producer shall be entitled to protection against the failure of such dis-

tributor to make payments for milk purchased from such producer thereafter and until otherwise notified by the Market Administrator. All deductions made pursuant to this section shall be kept in a separate account by the Market Administrator and shall in no event be used by him to meet any costs or liabilities incurred by him under this License, except as provided in this section.

Sec. 3. *Agents of Market Administrator.* The Market Administrator may, in his discretion, employ the facilities and services of any agent or agents for the purpose of securing to producers the aforementioned benefits, if such benefits may be efficiently and economically secured thereby. The Market Administrator shall pay over such funds to such agent or agents, if he determines to do so, only upon the consent of such agent or agents to (1) keep its or their books and records in a manner satisfactory to the Market Administrator; (2) permit the Market Administrator to examine its or their books and records; and to furnish the Market Administrator such verified reports or other information as the Market Administrator may from time to time request; and (3) disburse such funds in the manner above provided.

Sec. 4. *Waiver of Deductions.* The Market Administrator, in his discretion, may at any time waive the foregoing deductions or distribute any balance arising from such deductions, or any part thereof, for any delivery period (in which event the deductions so waived shall not be made by the distributors from payments to producers); the distribution of any such balances shall be equitable (1) among all producers with respect to the amounts paid to the Market Administrator pursuant to section 1 of this article, and (2) among all producers from whom such deductions have been made pursuant to section 2 of this article.

#### ARTICLE XIII—DISTRIBUTOR'S FINANCIAL RESPONSIBILITY

Section 1. *Bond.* Each distributor who purchases milk from producers and sells any part of such milk for distribution as whole milk for consumption in the Sales Area shall, within thirty days after the receipt of a notice to that effect from the Market Administrator, furnish to the Market Administrator a bond with good and sufficient

surety thereon, satisfactory to the Market Administrator (in an amount not in excess of the purchase value of the milk purchased by such distributor during any two successive delivery periods as designated by the Market Administrator) for the purpose of securing the fulfillment of such distributor's obligations as provided in this License. Any distributor who commences to do business after the effective date of this License, shall, as a condition precedent to engaging in such business, furnish to the Market Administrator a bond in conformity with the foregoing provision.

Sec. 2. *Waiver of Bond.* The Market Administrator may (1) if satisfied from the investigation of the financial condition of a distributor that such distributor is solvent and/or possessed of sufficient assets to fulfill his said obligations, or (2) if, pursuant to a State statute, a distributor has furnished a bond with good and sufficient surety thereon in conformity with the foregoing provision, waive the requirement of such bond as to such distributor. Such distributor may, upon a change in such circumstances, be required by the Market Administrator to comply with the foregoing requirement.

Sec. 3. *Periodic Deposits.* Each distributor who is unable to meet the requirements of the foregoing provisions, shall make periodic deposits with the Market Administrator at such times, in such amounts and in such manner as the Market Administrator may determine to be necessary in order to secure the fulfillment of such distributor's obligations as provided in this License.

#### ARTICLE XIV—MILK INDUSTRY BOARD

Section 1. *Establishment.* The Secretary may, in his discretion, at any time establish a Milk Industry Board, which shall have representation of producers, distributors, and the public. In establishing the Milk Industry Board, the Secretary will give due consideration to the recommendations and nominations by various groups of producers, distributors and the consuming public.

Sec. 2. *Duties and Powers.* The Milk Industry Board shall have such duties and powers as the Secretary may, from time to time, delegate to it, in order to effectuate the provisions and purposes of this License.

**Sec. 3. Expenses.** The Secretary may further, in his discretion, authorize and direct the Market Administrator to pay over to the Milk Industry Board for the purpose of meeting its general expenses, a portion of the monies paid to the Market Administrator for his cost of operation: *Provided*, That such portion shall in no event exceed 4 cent per hundred pounds of milk for which such payment is made.

#### ARTICLE XV—GENERAL PROVISIONS

**Section 1. Books and Records.** The distributors and their respective affiliates and subsidiaries shall severally keep books and records which will clearly reflect all the financial transactions of their respective businesses and the financial condition thereof.

**Sec. 2. Reports.** The distributors shall severally, from time to time, upon the request of the Secretary, furnish him with such information as he may request, in a manner prescribed by him and/or in accordance with forms of reports to be supplied by him, for the purposes of (1) assisting the Secretary in the furtherance of his powers and duties with respect to this License and/or (2) enabling the Secretary to ascertain and determine the extent to which the declared policy of the Act and the purpose of this License are being effectuated; such reports to be verified under oath. The Secretary's determination as to the necessity of and the justification for the making of any such reports, and the information called for thereby, shall be final and conclusive.

**Sec. 3. Examination of Books and Records.** For the same purposes as set forth in section 2 of this article and/or to enable the Secretary to verify information furnished him, all the books and records of each distributor and the books and records of the affiliates and subsidiaries of each distributor, shall, during the usual hours of business, be subject to examination by the Secretary. The Secretary's determination as to the necessity of and the justification for any such examination shall be final and conclusive.

**Sec. 4. Confidential Information.** To the extent not otherwise expressly provided by this License, all informa-

tion in the possession of the Secretary, the Market Administrator, their agents, or any official, which relates to the business or property of any person and which was furnished by or obtained from such person pursuant to the requirements of this License, shall be kept confidential in accordance with the applicable General Regulations of the Agricultural Adjustment Administration.

**Sec. 5. Agents.** The Secretary may by designation in writing, name any person or persons, including officers or employees of the Government, or Bureaus or Divisions of the Department of Agriculture, to act as his agents or agencies in connection with any of the provisions of this License, and he may authorize any such agent or agency to designate or appoint persons, including officers or employees of the Department of Agriculture, to exercise or perform any or all of the powers and functions delegated to them as may be deemed necessary or advisable to accomplish the proper execution or performance of such powers and functions.

**Sec. 6. Separability.** If the applicability of any provision of this License to any person, circumstance or thing is held invalid, the applicability thereof to any other person, circumstance or thing, shall not be affected thereby. If any provision of this License is declared invalid, the validity of the remainder of this License shall not be affected thereby.

**Sec. 7. Derogation.** Nothing contained in this License is or shall be construed to be in derogation or modification of the rights of the Secretary, or of the United States (1) to exercise any powers granted by the Act or otherwise, and/or (2) in accordance with such powers, to act in the premises whenever such action is deemed advisable.

**Sec. 8. Termination.** In the event this License is terminated or amended by the Secretary, any and all obligations which shall have arisen, or which may thereafter arise in connection therewith, by virtue of or pursuant to this License, and any violations of this License which may have occurred prior to such termination or amendment, shall be deemed not to be affected, waived or terminated by reason thereof, unless so expressly provided in the notice of termination of, or the amendment to this License.

Sec. 9. *Period of Notice.* The Secretary hereby determines that an emergency exists which requires a shorter period of notice than three days, and that the period of notice, with respect to the issuance of this License, which is hereinafter provided, is reasonable under the circumstances.

IN WITNESS WHEREOF, H. A. Wallace, Secretary of Agriculture, acting under the provisions of the Agricultural Adjustment Act, as amended, and pursuant to the applicable General Regulations of the Agricultural Adjustment Administration, does hereby execute in duplicate and issue this Amended License in the City of Washington, District of Columbia, on this 1st day of Dec., 1934, and pursuant to the provisions hereof, declares this License to be effective on and after 12:01 a. m., eastern standard time, Dec. 2, 1934.

H. A. WALLACE,  
*Secretary of Agriculture.*

### EXHIBIT A.

#### ALLOTMENT AND REGULATION OF BASES

Section 1. *Allotment of Bases.* For the purposes of this License, each producer shall be allotted a base as follows:

1. In the case of producers (excepting new producers) who are members of the Pure Milk Association, herein-after called the "Association", the bases recorded in the files and records of the Association shall be the bases of such producers. The Market Administrator shall have access to such files and records.
2. In the case of producers who are not members of the Association, bases shall be allotted by the Market Administrator, which bases shall be equitable as compared with the bases of producers who are members of the Association.
3. In the case of producers who have been delivering milk in the Sales Area prior to 90 days before the effective date of this License, but for whom bases have not already been allotted pursuant to paragraphs 1 and 2,

bases shall be allotted by the Market Administrator equal to 90 per cent of such producer's average deliveries of milk during the first three months, excepting May and June, for which records of such producer's deliveries are requested by and reported to the Market Administrator.

4. In the case of each new producer, a base shall be allotted by the Market Administrator which shall be equal to 80 per cent of the total delivery of milk by such new producer for each of the first three months, excepting May and June, during which such new producer delivers milk to distributors. For any part of May or June falling within such three months the base for each new producer shall be equal to 60 per cent of his total delivery of milk. After such new producer has delivered milk to distributors for three months, he shall be allotted a base by the Market Administrator equal to the average of his base during such three months.

Sec. 2. *Revision of Bases.* The Market Administrator may make such revisions in the bases of producers who are not members of the Pure Milk Association as he may, from time to time, deem necessary or advisable, to the end that such bases may be equitable as among producers.

Sec. 3. *Reports by Distributors.* Upon the request of the Market Administrator, each distributor, who has not already submitted reports containing the information required in this paragraph, shall, within ten days after receiving such request, submit to the Market Administrator written reports, verified under oath, containing the following information with respect to each producer, who has delivered milk to such distributor; for each calendar month during the years 1933 and 1934 or such portion thereof as the producer may have delivered milk, (1) the total pounds of delivered milk, (2) the number of days in each month upon which deliveries were made.

Sec. 4. *Announcement of Bases.* When bases are established for producers pursuant to paragraphs 2, 3, and 4 of section 1, or revised pursuant to section 2 of this exhibit, the Market Administrator shall notify each distributor of the bases of such producers who are delivering milk to each such distributor.

Sec. 5. *Tenure and Transfer of Bases.* The following

rules shall govern the tenure and transfer by producers of all bases allotted pursuant to this exhibit:

1. Any producer who voluntarily ceases to market milk pursuant to the terms and provisions of this License for a period of more than forty-five (45) consecutive days shall forfeit his base.

2. Because of the lack of feed resulting from the severe drought in the Chicago production area, any producer may upon notice to the Market Administrator, discontinue the deliveries of milk to distributors in the Sales Area at any time after the effective date of this License and retain his base notwithstanding the provision in paragraph 1, provided that such producer's base be not transferred to another person, and that he resumes such deliveries on or before June 1, 1935.

3. A base may be transferred to another person upon the sale and transfer of the producer's entire herd to such person: *Provided, however,* That such base so transferred shall be forfeited unless the entire herd is maintained for six months consecutively after such sale and transfer. Such transfer shall be reported to the Market Administrator.

4. A producer with a base, whether landlord or tenant, may retain his base when moving his entire herd from one farm to another farm.

5. A landlord who rents on shares is entitled to the entire base to the exclusion of the tenant, if the landlord owns the entire herd. Likewise, the tenant who rents on shares is entitled to the entire base to the exclusion of the landlord if the tenant owns the entire herd. If the cattle are jointly owned by tenant and landlord, the base shall be divided between the joint owners according to the ownership of the cattle if and when such joint owners terminate the tenant-landlord relationship.

Docket No. 1-C  
License No. 30

UNITED STATES DEPARTMENT OF AGRICULTURE  
AGRICULTURAL ADJUSTMENT ADMINISTRATION

LICENSE SERIES—LICENSE No. 30

AMENDMENT TO AMENDED LICENSE  
FOR MILK

CHICAGO, ILLINOIS, SALES AREA.

Issued by the Secretary of Agriculture, January 16, 1935.  
Effective date January 17, 1935 (12:01 a. m., eastern standard time).

AMENDMENT TO AMENDED LICENSE  
FOR MILK

CHICAGO, ILLINOIS, SALES AREA

WHEREAS, H. A. Wallace, Secretary of Agriculture, acting under the provisions of the Agricultural Adjustment Act, as amended, for the purposes and within the limitations therein contained, and pursuant to the regulations issued thereunder, has, on the 3rd day of February, 1934, issued a License for Milk—Chicago Sales Area, which License was subsequently amended on May 31, June 30, July 17, August 21, October 30, and December 1, 1934; and

WHEREAS, the undersigned finds that it is necessary to issue the following Amendment to the said License for Milk—Chicago, Illinois, Sales Area, pursuant to section 8 (3) of the Agricultural Adjustment Act, and applicable General Regulations of the Agricultural Adjustment Administration; and

WHEREAS, the undersigned finds that the said License and this Amendment are in accordance with the provisions of section 8 (3) of the said Act and tend to effectuate the declared policy set forth in section 2 of said Act, in that the terms and conditions thereof

(a) will tend to establish and maintain such balance between the production and consumption of milk and/or products thereof, and such marketing conditions therefor; as will tend to reestablish prices to farmers producing said commodities at a level that will give such commodity and/or products thereof a purchasing power with respect to articles that farmers buy equivalent to the purchasing power of such commodity and/or products thereof in the base period, August 1909-July 1914;

(b) will tend to approach such equality of purchasing power by gradual correction of the present inequalities therein at as rapid a rate as is deemed feasible in view of the current consumptive demand in domestic markets;

(c) will protect the consumers' interest by tending to readjust the farm production of said commodities at such level as will not increase the percentage of the consumers' retail expenditure for said commodity and/or products thereof, which is returned to the farmer, above the percentage which was returned to the farmer in the pre-war period, August 1909-July 1914; and

(d) are necessary to eliminate unfair practices and charges which would prevent or tend to prevent the effectuation of the said declared policy and the restoration of normal economic conditions in the marketing of the said commodity and/or products thereof, and the financing thereof.

WHEREAS, the undersigned finds that the subject matter of this Amendment is embraced within the scope of a hearing heretofore held on a Marketing Agreement pursuant to applicable General Regulations of the Agricultural Adjustment Administration:

Now, THEREFORE, the undersigned, acting under the authority vested in the Secretary of Agriculture under the provisions of the Agricultural Adjustment Act, as amended, hereby amends and modifies the terms and conditions of the said License, as amended, (hereinafter called the "License"), as follows:

1. That paragraph 5, section 3 of article III, of the

License, which appears below, be deleted from the License:

"5. And the power, upon the specific approval of the Secretary, to institute legal proceedings in his own name, as Market Administrator, and to take any other steps which may be necessary to collect any and all monies which may become due and owing to him as such Market Administrator and to enforce such obligations as accrue to him as such Market Administrator under the terms and provisions of this License."

2. That the following be substituted as paragraph 5, section 3 of article III, of the License:

"5. To publicly disclose, with the consent of the Secretary, (a) the names of persons who are in violation of this License, and (b) the nature of such violations."

3. That the following be added as paragraph 6, section 3 of article III of the License:

"6. And the power, upon the specific approval of the Secretary, (a) to institute legal proceedings in his own name, as Market Administrator; (b) to take any other steps which may be necessary to collect any and all monies which may become due and owing to him as such Market Administrator; (c) to enforce such obligations as accrue to him as such Market Administrator under the terms and provisions of this License; and (d) to settle and compromise all such obligations."

4. That section 4 of article IV of the License, which appears below, be deleted from the License:

*"Sec. 4. Limitation as to Purchases from Producers without Bases.* No distributor shall purchase milk or cream, for Class I or Class II purposes, produced by producers without bases, unless sufficient milk to meet all his Class I requirements, and sufficient milk or cream to meet his Class II requirements up to a quantity of milk or milk equivalent equal to 35 percent of his Class I milk, is not tendered by producers with bases or by distributors purchasing only from producers with bases."

5. That the following be substituted as section 4 of article IV of the License:

*"Sec. 4. Limitation as to Purchases from Producers without Bases.* No distributor shall purchase milk or cream, for Class I or Class II purposes, produced by producers without bases, unless sufficient milk to meet all his Class I requirements, and sufficient milk or cream to meet his Class II requirements up to a quantity of milk or milk equivalent equal to 25 percent of his Class I milk, is not tendered by producers with bases or by distributors purchasing only from producers with bases."

6. That paragraph 1, section 1 of article V of the License, which appears below, be deleted from the License:

*"1. Class I milk—\$2.00 per hundredweight."*

7. That the following be substituted as paragraph 1, section 1 of article V of the License:

*"1. Class I milk—\$2.20 per hundredweight."*

8. That section 2 of article XIV of the License, which appears below, be deleted from the License:

*"Sec. 2. Duties and Powers.* The Milk Industry Board shall have such duties and powers as the Secretary may, from time to time, delegate to it, in order to effectuate the provisions and purposes of this License."

9. That the following be substituted as section 2 of article XIV of the License:

*"Sec. 2. Duties and Powers.* The Milk Industry Board shall have such duties and powers as the Secretary may, from time to time, delegate to it, in order to effectuate the provisions and purposes of this License, and to recommend to the Secretary that obligations arising under the terms and provisions of this License, and due and owing to the Market Administrator, be settled and compromised."

10. This Amendment to the License shall become effective at such time as the Secretary may declare above his signature attached hereto.

11. The provisions of the License, except as amended by this Amendment, shall continue to be in full force and effect.

12. Nothing herein contained shall release or otherwise affect the liability of any licensee in respect to any violation by him prior to the effective date of this Amendment to the License.

13. The undersigned hereby determines that an emergency exists which requires a shorter period of notice than three days, and that the period of notice, with respect to the issuance of this Amendment to the License, which is hereinafter provided, is reasonable under the circumstances.

IN WITNESS WHEREOF, H. A. Wallace, Secretary of Agriculture, acting under the provisions of the Agricultural Adjustment Act, as amended, and pursuant to the applicable General Regulations of the Agricultural Adjustment Administration, does hereby execute in duplicate and issue this Amendment to the License for Milk, Chicago Sales Area, in the City of Washington, District of Columbia, on this 16th day of January, 1935, and pursuant to the provisions hereof, declares this Amendment to be effective on and after 12:01 a. m., eastern standard time, January 17, 1935.

H. A. WALLACE,  
*Secretary of Agriculture.*

IN THE

# Supreme Court of the United States

OCTOBER TERM, A. D. 1939.

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UNITED STATES OF AMERICA,

*Appellant,*

*vs.*

THE BORDEN COMPANY, et al.,

*Appellees.*

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APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES  
FOR THE NORTHERN DISTRICT OF ILLINOIS,  
EASTERN DIVISION.

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BRIEF ON BEHALF OF LESLIE G. GOUDIE

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DANIEL D. CARMELL,

*Attorney for Leslie G. Goudie.*

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APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES  
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EASTERN DIVISION.

---

**BRIEF ON BEHALF OF LESLIE G. GOUDIE**

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**STATEMENT.**

We shall not repeat the applicable points and authorities relied upon by the other defendants herein, but shall ask this court to assume that the positions stated by each of them are adopted by this defendant, (Leslie G. Goudie) as though specifically included herein.

This indictment contains 4 counts, Count I charges an unlawful combination and conspiracy to arbitrarily fix, maintain and control artificial and non-competitive prices to be paid to all producers for fluid milk (R. 11, p. 47).

Count II charges a similar combination for the sale by distributors in the City of Chicago of fluid milk shipped into the City (R. 17, p. 63).

Count III is not involved in this appeal (Brief for U. S., p. 11).

Count IV charges the defendants unlawfully have combined and conspired with one another to limit control and restrain and obstruct the supply of fluid milk moving in channels of interstate commerce (R. 25, par. 88).

The indictment specifically describes Leslie G. Goudie and charges him with doing specific things, namely:

"Leslie Goudie has been, throughout the period covered by this indictment, and now is, president of the Joint Council No. 25 of the International Brotherhood of Teamsters, Chauffeurs, Stablemen and Helpers of America, an affiliation of the American Federation of Labor, and is hereby indicted and made a defendant herein. The Joint Council is an advisory body to the forty-seven local unions comprising all of the teamsters' and chauffeurs' unions in the City of Chicago, including Local 753, and is composed of the officers of each local union" (R. 10, par. 41).

In each count Leslie Goudie is charged with "acting in concert with the other defendants and pursuant to and in execution of the combination and conspiracy hereinbefore alleged . . . did: (1) counsel, advise and direct the defendant Local 753 and the officials and agents of Local 753 with respect to the acts described in paragraph . . . above; (ii) through the instrumentality of the Joint Council of the International . . . prevent the delivery of daily supplies of meat, bread, bakery products,

vegetables, and other foods by members of unions affiliated with the said Joint Council to places of business served by the independent distributors who refused to purchase fluid milk at the prices fixed and determined as aforesaid" (R. 15, 19, 23, 28).

Thus, the indictment first charges that Goudie is president of the Joint Council which is *only an advisory body*, and in each count charges that through the instrumentality of this *advisory body*, over which Goudie merely presided as president, he did counsel, advise and direct officials and agents of Local 753, which union was a member of this advisory body.

**Congress never intended that the Sherman Anti-Trust Act of 1890 should ever apply to labor unions.**

Since the inception of the Sherman Anti-Trust Act, labor generally and labor unions in particular, have considered themselves from without the scope of its prohibitions. Labor unions have constantly denied that its activities, whose essential purpose is its struggle for the betterment of their working conditions, improvement in hours and striving to secure for their members and workers generally, wages that will equal the best American standard of living, are ever subject to the Sherman Act. With approximately 10,000,000 members of organized labor firmly of this belief, and chafing under the unreasonable restraint imposed upon them by the courts and threats of prosecution by government agencies while in the furtherance of their legitimate activities, it is of prime importance that this Court consider and fully pass upon these questions:

- (1) Was the Sherman Act intended to cover trade union activities, and
- (2) Have not the decisions of the Courts holding that

the Act was so intended been based upon an erroneous premise, and therefore should be overruled and set aside.

There can be no dispute about the fact that the agitation which led to the passage of the Sherman Anti-Trust Act of 1890 was the desire to eliminate the evils of business trusts, and business monopolies. Judge Billings in *U. S. v. Workingmens Amalgamated Council of New Orleans*, 54 Fed. 994, 996 (1893) so found when he said: "I think the Congressional debates show that the statute had its origin in the evils of massed capital \* \* \*". However, Judge Billings continued and said: "\* \* \* but when the Congress came to formulating the prohibition which is the yardstick for measuring the complainants' right to the injunction \* \* \* (the) subject had so broadened in the minds of the legislators that the source of evil was not regarded as material, and the evil in its entirety is dealt with. They made the interdiction include combinations of labor, as well as capital \* \* \*".

Here we have the nub of the controversy. Did the subject so broaden in the minds of the legislators as to include combinations of labor?

It is conceded by all that the primary object of all bills introduced in Congress relating to unlawful combinations in restraint of trade were aimed at evils growing out of great industrial trusts.

It is true that this Court in *Loewe v. Lawlor*, 208 U. S. 274, 301 (1908) has said:

"The records of Congress show that several efforts were made to exempt, by legislation, organization of farmers and laborers from the operation of the act and that all these efforts failed, so that the act remained as we have it before us."

This Court has bottomed its decisions upon two facts: (1) that efforts to exempt laborers from the operation of the act failed, and (2) that it was from the present act that these amendments were refused. If these are found historically to be incorrect, then it must be conceded that the holding of the court was not justified. Therefore, we must revert to a study of the anti-trust bills presented to Congress and the debates in relation thereto.

#### Bills introduced prior to 1890.

The present Anti-Trust Act was passed in 1890. Most of the anti-trust measures introduced prior to the passage of the Sherman Act, for the purpose of making the restraint upon trust more effective, *declared against combinations the tendency of which would be to raise prices*, and every such bill directed against price fixing combinations contained provisos exempting labor and farm operations from their operation. After the passage of the Sherman Act, bills with the same provisions as to price raising combinations and labor and farmer organization exemptions were introduced by Senator George, Representatives Lane, Blanchard, McRoe and Tucker in 1892 and later in 1898.

(Bills and Debates, pp. 411, 417, 431, 433, 437, 441, 449, 451, 465, 469, 473, 477, 481 and 581.)

On August 14, 1888, Senator Sherman introduced a bill entitled "A bill to declare unlawful trusts and combinations in restraint of trade and production", Section 1 provided that "all arrangements between persons or corporations made with a view, or which tend, to prevent full and free competition \* \* \* or which tend to advance the cost to the consumer of \* \* \* articles, are hereby declared to be against public policy, unlawful, and void".

On September 11, 1888, this bill was reported out of the Committee on Finance in an amended form by Senator Sherman.

(Bills and Debates Relating to Trusts. No. 147, Senate Documents, Vol. 14, 57th Congress, 2nd Session, pp. 11-13.)

On February 4, 1889, the bill was reached for debate in the Senate. Senator George, who was desirous that labor and farm organizations should not be effected by an attempt to restrain monopolies, said:

"(This) bill not only prevents combinations between farmers to raise the price of their products, but it would (though not so intended by the framers) embrace combinations among working men to increase the amount of their wages. For an increase in their wages would tend to increase the price of product to the consumer, and thus would come within the express term of the bill."

(Congressional Record, 50th Congress, 2nd Session, Vol. 20, page 1459.)

This statement was apparently sufficient to cause the bill to be abandoned for nothing further was done in the 50th Congress with reference to this bill.

#### **Introduction of bills which lead to present act.**

Senator Sherman, on December 4, 1889, introduced into the 51st Congress another bill entitled "A Bill to declare unlawful trust and combinations in restraint of trade and production". This was referred to the Committee on Finance of which Senator Sherman was Chairman. On March 18, 1890, it was reported out of Committee and Section 1, read as follows:

"That all arrangements, contracts, agreements, trusts or combinations between two or more citizens or corporations \* \* \* of different states \* \* \*

made with a view or which tend to prevent full and free competition in the importation, transportation or sale of articles imported into the United States, or with a view or which tend to prevent full and free competition in articles of growth, production or manufacture of any State \* \* \* or in the transportation or sale of the article \* \* \* and all arrangements, trusts, or combinations between such citizens or corporations, made with a view or which tend to advance the cost to the consumer of any such articles, are hereby declared to be against public policy, unlawful and void \* \* \*"

(Bills and Debate, pp. 69, 71; 89.)

On March 21, 1890, when the measure was being debated, Senator Sherman spoke for the measure and in his statement clearly pointed out that the only combinations that the bill intended to reach were combinations of a business nature.

(Congressional Record, Vol. 21, pp. 2455-2474.)

On March 21, 1890, Senator Reagan offered a substitute to be added to the Sherman bill, the important part of which was section 4, which declared that "a trust is a combination of capital, skill or acts of two or more persons, firms or associations of persons, or any two or more of them, for either, any, or all of the following purposes": (1) to carry out restrictions of trade, (2) to limit production or to increase the price of commodities, (3) to prevent competition in manufacture, purchase, sale or transportation of commodities, (4) to fix a standard or figure for the purpose of controlling prices, (5) to create monopoly in manufacture, purchase, sale or transportation, and (6) to enter into a contract of any kind for the purpose of restricting competition, setting prices, etc.

(Cong. Rec., Vol. 21, p. 2560.)

This amendment for the first time directly approached in language a possible construction aimed at labor and

labor organization, when section 4 defined a "trust", as a "combination of capital, skill" \* \* \*

If it was the intention of Congress to include labor organizations in the final bill as it was later drafted by the judiciary committee, it had before it language which would have clearly and unequivocally expressed that intent by the use of a definition of a "trust" as in the Reagan amendment and the use of the word "skill", which refers to labor, as his product was his skill at a given trade which he could use or refrain from using as an individual or through his association with others in a labor union for the betterment of his wages, hours and conditions of employment. The omission in the final act to clearly so state, and on the other hand, the limitation of the word "trust" to its ordinary accepted meaning of an industrial combination, by the elimination of the word "skill" from its definition showed a definite intention on the part of the framers to omit labor unions and their officers.

#### **Debate relating to labor and exemption proviso.**

On March 24, when the Sherman Act and the Reagan Amendment was being debated, Senator George was one of the first to raise the question as to whether the bill if enacted into law would not interfere with union activities. He said:

"The object of that organization (Knights of Labor), as I understand \* \* \* is to increase the price of their wages. Now increasing the price of wages has a tendency, in the language of this bill, to increase the price of the product of labor."

He then asked Senator Sherman the direct question: "Are they not also included \* \* \* in the bill of the Senator from Ohio"?

Senator Teller was also very much concerned with this aspect, for he said:

"I know that nobody here proposes to interfere with the class of men (laborers and farmers) I have mentioned \* \* \*. And while I am exceedingly anxious to join in anything that shall break up and destroy unholy combinations (trusts) \* \* \* I want to be careful that in doing that we do not do more damage than we do good. \* \* \* Therefore, I suggest that the Senators who have this subject in charge give it special attention, and by a little modification it may be possible to relieve the bill of any doubt on this point".

Poised with these pointed and direct questions, and sensing the concern of the senators concerning the possible scope of the bill, and being called upon specifically to answer the question: Does the language of the bill necessarily cover the activities of organized labor? Senator Sherman, as the sponsor of the bill, answered the question emphatically:

"Combinations of workingmen to promote their interests, promote their welfare, and increase their pay if you please, to get their fair share in the division of production, *are not affected in the slightest degree*, nor can they be included in the words of intent of the bill now reported". (Italics ours.)

(Congressional Record, Vol. 21, pt. 3, 51st Congress, pp. 2560 to 2562.)

So concerned was the Senate that by no possible stretch of the imagination a contra result would be obtained, that Senator Teller, then said:

"(It) would reach to nearly every transaction in life and would be particularly oppressive upon the struggling masses who are making combinations to resist accumulated wealth \* \* \*. *It is not the intention of anybody here to make that construction of it; we are trying to remedy the evil; but it is very*

probable that if this bill were passed the very first prosecution would be against combination of producers and laborers whose combinations tend to put up the cost of commodities to consumers." (Italics ours.)

(*Ibid*, pp. 2565.)

No Senator challenged the assertion that "it is not the intention of anybody here to make that construction of it." This is significant. When a state of mind or an intention is shown to exist with reference to a legislative subject matter, it continues to exist unless a clear showing to the contrary can be presented. The ensuing debates are entirely devoid of any indication that any senator desired to see a measure passed which in any manner would hinder or affect labor unions.

Despite the unqualified assurance of Senator Sherman that organized labor was immune from the phraseology of the bill, the anxiety of several members of the Senate, notably, Senators Hoar, George and Stewart, was not allayed. They were vitally concerned lest the "first prosecutions" would be against combinations of laborers and producers. (Remarks of Senator Stewart, *Ibid*, pp. 2565, 2606; also Senator Morgan, p. 2609.) It was stated that with all due respect to the efforts towards controlling and curbing industrial trusts, they wanted further guarantees that it was not the intention of the bill that the "natural and inherent right" of organized labor would be interfered with.

The Senate thereafter acting as a Committee of the whole, adopted the Reagan Amendment (Cong. Rec., Vol. 21, p. 2611). Thereafter Senator Sherman offered a proviso exempting labor and farmer organizations from the operation of the bill. He stated:

"I do not think it necessary, but at the same time,

to avoid any confusion, I submit it to come in at the end of the first section."

The amendment was adopted without the formality of a roll call and read:

"Provided: That this act shall not be construed to apply to any arrangements, agreements, or combinations between laborers, made with the view of lessening the number of hours of their labor or of increasing their wages; nor to any arrangements, agreements, associations, or combinations among persons engaged in horticulture or agriculture, made with a view of enhancing the price of their own agricultural or horticultural products."

On March 26th Senator Aldrich offered an additional amendment for the purpose of exempting labor, to be added after the first section, which was likewise adopted with a roll call, it read:

"Provided, further, that this act shall not be construed to apply to or declare unlawful combinations or associations made with a view or which tend, by means other than by a reduction of the wages of labor, to lessen the cost of production, or to reduce the price of any of the necessities of life, nor to combinations or associations made with a view or which tend to increase the earnings of persons engaged in any useful employment."

Thereafter a series of amendments were adopted which was believed to encumber the bill, and on March 27, after Senator Platt stated that much of the bill was probably unconstitutional and that, "The conduct of this Senate for the past three days—and I make no personal illusions—has not been in the line of the honest preparation of a bill to prohibit and punish trusts . . . ." the bill was referred to the Judiciary committee with instructions to report in 20 days.

On April 2, 1890 (about 6 days later), the Committee

reported the Sherman bill back to the Senate, with a recommendation that everything after the enacting clause be stricken out and that the measure formulated by the committee be substituted; as thus reported the bill was identical with the present Sherman Anti-Trust Act.

Of this, Professor Edward Berman, in his "Labor and the Sherman Act", observes on page 31:

"It should be noted that absolutely no mention was made in the Senate debates, after the Judiciary Committee had reported, of the applicability of the bill to labor and farmers' organizations. The entire attention of the senators appeared to be directed to a single question, 'Was or was not the measure well suited to restrain the undesirable activities of business combinations?' In view of the fact that the applicability of the original Sherman bill and of the Reagan amendment to labor and farmers' organizations was much in the foreground in the debates on those measures, the silence concerning this matter in the debates on the Judiciary Committee substitute should be considered pertinent."

Continuing this thought, Professor Berman on page 33 states:

"It has already been pointed out that there was no discussion in the House of Representatives as to whether the Senate bill applied to farmers' and labor unions. Such organizations were mentioned, however. Representative Stewart, in the debates of June 11, 1890, criticized the Bland amendment because he thought it would prevent all agreements between railroads. He expressed the opinion, since widely accepted, that unrestricted competition among the railroads was harmful to all classes. In the course of his argument he made the following remarks:

'Why do the laborers organize and combine to put up the price of labor, and so enhance the cost of everything to the consumer? Because of excessive competition. Yet my friend from Missouri (Rep. Bland) does not propose to apply

any remedy in that direction. Nothing more largely affects the cost of articles to every consumer \*\*\* than the combinations of labor. Who complains of it? I do not. I think the laborer is justified, where competition is excessive \*\*\* in entering into combinations for self protection \*\*\*' Cong. Rec. Vol. 21, p. 5956.

A careful examination of the House debates fails to produce any other extended references to labor and farmers' organizations. It appears significant that the foregoing discussion by Representative Stewart assumed as a matter of course that the Judiciary Committee bill did not extend to such organizations, and that Mr. Stewart, who represented the House on the conference committee which negotiated the final agreement as to the adoption of the Anti-trust Act, declared that he had no objection to labor and farmers' organizations."

From the foregoing, it is apparent that there is absolutely no evidence that "when Congress came to formulating the prohibition \*\*\* (that the) subject had so broadened in the minds of the legislators that the source of evil was not regarded as material, and the evil in its entirety is dealt with. They made the interdiction include combinations of labor, as well as capital" as held in *U. S. v. Workingmen's Almag. Council*, 54 Fed. 994, 996. The facts are that Congress at all times showed a firm intention that labor unions were not included or to be included, as evidenced by the unqualified statement of Senator Sherman, the sponsor of the Act.

As has been pointed out, the Sherman Bill as reported from the Finance Committee and the Reagan Amendment prohibited all combinations, the effect of which was to increase the price of commodities to consumers. It was this provision against price raising that caused Senators Hiscock, Teller, George, Stewart and Morgan to fear the effect of this proposal on farmer and labor organizations.

They each pointed out that such organizations tend to increase prices, and hence their activities might be interfered with. To meet this, Senator Sherman, although he thought it unnecessary, offered a proviso exempting labor organizations, which was adopted without a roll call. It was so worded as to meet the objection that the anti-price raising provision would embarrass labor and farmers' unions. Senator Aldrich followed the next day with a further proviso which exempted combinations or associations made with a view, or which tend to increase the earnings of persons engaged in any useful employment, which also was adopted without roll call.

It is true that on March 27th, Senator Edmunds objected to a bill which permitted labor to combine to raise wages and thus costs, but which at the same time, in his belief, prohibited combinations of employers to pass these costs to the consumer, to which Senator Hoar vigorously replied and pointed out the essential differences in the two combinations and the unions' lack of economic equality in the struggle.

The final bill, as reported by the judiciary committee, declared unlawful combinations in restraint of interstate trade or commerce which monopolizes or attempts to monopolize such trade and commerce. The bill was entirely silent about combinations to increase prices, though the original bill contained the labor proviso exempting certain combinations, whose tendency it was to increase prices. Certainly there is no valid reason why such provisos should have been included in this new bill. Thus we have the Senate unanimous in its desire to exempt labor from the provisions of the bill and there is no reason appearing in the record to indicate any change of mind in the six days. Is it not reasonable to assume that when the final bill was drafted that they believed it unnecessary to in-

clude a labor exemption clause for the simple reason that in the form in which the bill was finally reported out and from its language they believed labor would not be affected!

Both Senators George and Hoar, determined supporters of the position that labor should be exempted from the Anti-Trust Act were members of the judiciary committee which drew the final bill. They supported the bill on the floor of the Senate. Though nothing was said, every previous utterance on their part showed a definite adherence to the position that labor was not included. There is nothing in the records of the debates of Congress which indicated that the Senators who were supporting labor had changed their mind about the desirability of drawing a bill which did not include labor.

The title of the Sherman Bill, which condemns so-called restraint of competition was "A Bill to Declare Unlawful Trusts and Combinations in Restraint of Trade and Production." This was the title during all the discussions on whether the bill would apply to labor. If the Senate, when it passed the final bill containing a denunciation of "restraint of trade," meant by including such a denunciation, to have the bill embrace the acts of labor unions, it is fair to assume that Senator Sherman meant the same thing when he entitled his bill one to declare unlawful "combinations in restraint of trade and production"; yet, as he expressly declared on the floor of the Senate, he did not believe that it embraced labor unions.

#### **What was not presented to this Court in Loewe v. Lawler.**

Professor Berman in his "Labor and the Sherman Act", pages 81 to 85, points out that there is no evidence available to show that counsel for the Hatters' directly raised the point that Congress did not intend that the act

should reach labor unions. The only position of theirs which had even a slight bearing on the question, was that which asserted that since the workers were not engaged in interstate commerce, had no aim to restrain it, and had no means which directly did so, the Sherman Act did not affect them.

Counsel for the Loewe Company devoted the final section of their brief to a defense of the proposition that "members of a combination or a conspiracy under the anti-trust law are not exempt because they are not engaged in interstate transportation." They presented the opposition that Congress had refused to exempt labor unions from the provisions of the Sherman Act. They pointed out that the early bills introduced by Senators Reagan and Sherman contain no exemptions of labor unions; that Senator George on February 4, 1889 and Senators Teller and Hiscock on March 24, 1890, expressed the belief that the Sherman Bill which was before the Senate on those dates, would reach labor unions; and on March 25, 1890, Senator Sherman, in order to meet these objections, introduced an exemption provision, which was adopted. The brief of the Loewe Company then proceeded with the following:

"Subsequently, on March 27, 1890, the bill, as amended, was recommitted to the Senate Committee on Judiciary, which on April 2, 1890, reported a substitute bill, which *wholly omitted the amendment exempting organizations of farmers and laborers, and this bill, as reported, became a law on July 2, 1890.* (Italics in the brief.) The exempting amendment was, however, not omitted until there had been a debate as to the propriety of discriminating in favor of labor organizations, in which Senators Stewart, Hiscock, Hoar, Teller and George, participated. It is significant that after the Sherman law was enacted bills were introduced in the Fifty-second Congress, H. R. 6640, Sec. 1; 55th Congress, Senate 1546, Sec. 8; H. R.

10539, Sec. 7; 56th Congress, H. R. 11667, Sec. 7; 57th Congress, S. 649, Sec. 7; H. R. 14947, Sec. 7, to amend the Sherman Anti-trust Law so that it would be inapplicable to labor organizations, and while one of these (H. R. 10539, Sec. 7) passed the House in the 56th Congress, none ever became a law.

*Congress, therefore, has refused to exempt labor unions from the comprehensive provisions of the Sherman law against combinations in restraint of trade, and this refusal is the more significant, as it followed the recognition by the Courts that the Sherman Anti-Trust Law applied to labor organization."* (Italics in the brief.)

The brief then proceeded to quote from the decision in *United States v. Amalgamated Council* to the effect that Congress had "made the interdiction include combinations of labor, as well as of capital; in fact, all combinations in restraint of commerce, without reference to the character of the persons who entered into them." The decisions rendered in the Pullman cases were also discussed in support of the plaintiff's position.

Immediately preceding the presentation of the legislative history of the act the brief contained the following assertion: "Congress did not provide that one class in the community could combine to restrain interstate trade and another class could not. It had no respect for persons. It made no distinction between classes. It provided that 'every' contract, combination or conspiracy in restraint of trade was illegal."

The Supreme Court thus had presented to it by the counsel for the company the proposition that the hatters' combination, as a labor union, might be reached by the Sherman Act. Its response to the argument was brief but extraordinarily significant. The court said:

"Nor can the act in question be held inapplicable because defendants were not themselves engaged in interstate commerce. The act made no distinction between classes. It provided that 'every' contract, combination or conspiracy in restraint of trade was illegal. The records of Congress show that several efforts were made to exempt, by legislation, organ-

izations of farmers and laborers from the operation of the act and that all these efforts failed, so that the act remained as we have it before us."

The court then referred to the case of *United States v. Amalgamated Council*, and quoted that portion of the decision which was given in the Plaintiffs' brief in support of the argument that the act reached labor combinations. It referred also to the decisions in the Pullman cases.

It seems fair to say that, the statement of the Supreme Court concerning the congressional debates appears to have been based upon what the brief of the plaintiffs said; rather than upon a careful examination of the debates themselves. This was particularly unfortunate in view of the fact that in its history of the Sherman Act the counsel for the company made assertions which were misleading, as the following facts, already established, will show:

"(1) The provisos (there were two of them) exempting labor organizations, which were added to the Sherman bill, were attached to an anti-price raising measure. The Judiciary Committee bill, which became law, was not an anti-price raising measure, and probably did not seem to the Senate to require an exemption proviso on that account.

(2) The brief for the Plaintiffs gives the impression that the labor exemption provisos were omitted as a result of a debate in which 'propriety of discriminating in favor of labor organizations' was discussed. The fact is that the labor provisos were not separately omitted, but were discarded with the rest of the Sherman bill by the Judiciary Committee. The Sherman bill was sent to the latter committee not because the provisos troubled the Senate, but because so many impertinent, obstructive, and probably unconstitutional amendments had been added to it as to necessitate a thorough overhauling of the measure.

(3) There was only one senator who objected to the adoption of a labor exemption proviso. Numerous senators took the opposite view, and the Senate on two occasions adopted such a proviso.

(4) Despite the frequent references in the Senate

to the fact that the Sherman bill might reach labor and farmers' organizations; such a question was not mentioned in all the prolonged debates in the Senate and the House on the Judiciary Committee bill. The only reasonable explanation of this difference appears to be that the Sherman bill seemed to reach such organizations, whereas the bill actually passed did not, in the opinion of the members of Congress, do so.

(5) The brief for the plaintiffs asserted that it was significant that Congress, after the passage of the Sherman Act, had before it various proposals to exempt labor organizations, none of which it passed. It was declared further that there was special significance in the fact that this refusal to exempt labor followed the application of the act to union activities. The brief neglects to point out, however, that five of these six proposals were bills to make illegal combinations to prevent competition and to raise prices. These five bills, in other words, were not mere proposals to exempt labor from the Act of 1890. They were, on the contrary, proposals to strengthen the anti-trust legislation. They each had a labor exemption proviso because their framers considered such a proviso necessary in an anti-price raising bill."

In *Loewe v. Lawlor*, this court placed considerable emphasis on the fact that the "records of Congress show several efforts were made to exempt, by legislation, organizations of farmers and laborers from the operation of the act and that all these efforts failed, so that the act remained as we have it before us." This statement by the Court followed the line of reasoning of counsel for Loewe Company in their brief that:

"It is significant that after the Sherman law was enacted bills were introduced in the Fifty-Second Congress, H. R. 6640, Sec. 1, 55th Congress \* \* \* 56th Congress \* \* \* 57th Congress \* \* \* to amend the Sherman Anti-Trust Law so that it would be inapplicable to labor organizations, and while one of them (H. R. 10539, Sec. 7) passed the House in the 56th Congress, none ever became a law."

The same weight and significance should be given to the fact that after years of agitation, organized labor did secure an exemption from the operation of the Sherman law when it secured the passage of the Clayton Act. Its intent and purpose, as known to the entire country was to be relieved from the interpretation which they considered unwarranted; when the courts applied the Anti-Trust Act to them. Great emphasis has been placed by the Court upon the failure to secure passage of these subsequent bills, it would seem therefore that the passage of the Clayton Act which stated that labor unions shall not be regarded as an illegal combination or conspiracy in restraint of trade under the anti-trust laws, and which was intended to free labor unions from the burdens of the Sherman Anti-Trust Act, should be of equal importance and significance to this Court, particularly since only agreements, combinations, or conspiracy in restraint of trade violate the anti-trust law.

The importance of the passage of the Clayton Act by labor can be best illustrated by the utterance of the then President of the American Federation of Labor, Samuel Gompers, who hailed this act as labor's *Magna Charta*, (*Gompers, The Charter of Industrial Freedom—Labor Provisions of Clayton Anti-Trust Law, 1914, 21 Am. Fed. 957*).

As a matter of statutory construction it would seem clear that the Clayton Act was introduced and intended to remove certain restraints which had been placed upon labor by judicial interpretation of the Anti-Trust law.

A reading of Sections 6 and 20 of the Clayton Act at once leads to the conclusion that Congress intended that the Anti-Trust Act should no longer be applied to labor unions. The dissenting opinion of Mr. Justice Brandeis, concurred in by Mr. Justice Holmes and Clark in *Duplex*

*Printing Press Co. v. Deering, et al.*, 254 U. S. 443, 478 to 481, clearly shows that the Clayton Act was intended to improve the legal status of unions.

From the foregoing, was not the statement that "the application which courts made of the Sherman Law and the Clayton Act in labor controversies is, indeed, a study in irony \* \* \*" justified? (*Frankfurter & Green, The Labor Injunction*, p. 175 (1930).)

Mr. Justice Stone in his separate opinion in the *Bedford Co. v. Stone Cutters' Assn.*, 274 U. S. 37 at pages 55, 56, stated:

"As an original proposition, I should have doubted whether the Sherman Act prohibited a labor union from peaceably refusing to work upon material produced by non-union labor or by a rival union, even though interstate commerce were affected. In the light of the policy adopted by Congress in the Clayton Act, with respect to organized labor, and in the light of *Standard Oil Co. v. United States*, 221 U. S. 1; *United States v. American Tobacco Co.*, 221 U. S. 106, 178-180, I should not have thought that such action as is now complained of was to be regarded as an unreasonable and therefore prohibited restraint of trade. \* \* \* These views, which I should not have hesitated to apply here, have now been rejected again largely on the authority of the *Duplex* case. For that reason alone, I concur with the majority."

Frankfurter & Green in *The Labor Injunction*, at page 176 commented that:

"The Clayton Act was the product of twenty years of voluminous agitation. It came as clay into the hands of the federal courts and we have attempted a portrayal of what they made of it. The result justifies an application of a familiar bit of French cynicism: the more things are legislatively changed, the more they remain the same judicially."

This court has not hesitated to set aside old precedents without regard to the length of time that the decisions

have been upon the books, when it has been shown that these legal doctrines have been erroneously arrived at. (*West Coast Hotel Company v. Parrish*, 300 U. S. 379 (1937); *United States v. Bekins*, 304 U. S. 27; *Erie R. R. v. Tompkins*, 304 U. S. 64 (1938), overruling *Swift v. Tyson*, 16 Pet. 1 (1842); *Graves v. New York*, 59 S. Ct. 595 (1939), overruling *Collector v. Day*, 11 Wall. 113 (1871).)

It is respectfully submitted that a re-examination of the entire question by this court will result in the holding of the inapplicability of the Sherman Anti-Trust Act to the activities of labor unions.

## II.

The Sherman Anti-Trust Act containing criminal provisions, is vague, indefinite and uncertain and is violative of the due process clause of the 14th Amendment of the United States Constitution.

There is no better settled rule of law than the principle that a penal statute must be sufficiently explicit so as to inform those who are subject to it what conduct on their part will render them liable to its penalties. A statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application violates the first essential of due process of law.

*Connolly v. General Construction Co.*, 269 U. S. 385, 391.

No one may be required at peril of life, liberty or property to speculate as to the meaning of a penal statute, all are entitled to be "informed" as to what the State

commands or forbids. *Lanzetta v. State*, 59 S. Ct. 618, 619.

The indictment here charges that Leslie G. Goudie as President of the Joint Council, *an advisory body*, did "counsel, advise and direct" Local 753 and through the instrumentality of the Joint Council which is composed of the officers of each local union, he prevented the delivery of goods by members of unions affiliated with the Joint Council to places of business of independent distributors who refused to purchase fluid milk at prices fixed, (to take one count as an example).

Here the mere recital of the allegations in the indictment demonstrates their absurdity. How can an officer of an advisory body, which can meet with other union officials for the purpose of advising with each other only, be guilty of a crime merely because he is their presiding officer? Where Mr. Goudie, if we assume for the purpose of argument here, did give any advice, the others were free to take it or leave it as they pleased. We recite these facts to question how Mr. Goudie, a layman, could by looking at the provisions of the Sherman Anti-Trust Act know if he was violating it by doing the things he is charged with.

This Court in *Maple Flooring Ass'n v. United States*, 268 U. S. 563, 579, in discussing previous decision of this Court and their applicability said:

"It should be said at the outset, that in considering the application of the rule of decision in these cases to the situation presented by this record, it should be remembered that this Court has often announced that each case arising under the Sherman Act must be determined upon the particular facts disclosed by the record, and that the opinions in those cases must be read in the light of their facts and of a clear recognition of the essential differences in the facts of those cases, and in the facts of any new case to which the rule of earlier decisions is to be applied."

Mr. Chief Justice Taft and Mr. Justice Sanford dissented from the majority opinion of the Court in the above case as well as in the *Cement Manufacturers Association v. United States*, 268 U. S. 588, on the ground that in their judgment the evidence in each case brings it substantially within the rules stated in the *American Column Co. v. United States*, 257 U. S. 377 and *American Linseed Oil Co. v. United States*, 262 U. S. 371; in a separate opinion, Mr. Justice McReynolds dissented and stated that his belief was that the lower court was right and the decree should be affirmed. (Page 587.)

In the *Appalachian Coals, Inc. v. United States*, 288 U. S. 344, this Court in passing upon the facts therein contained held that when a suit is brought under the Sherman Act there must be "a definite factual showing of illegality" and that the Government failed to show adequate grounds for an injunction in this case. Mr. Justice Hughes said on page 377:

"We recognize, however, that the case has been tried in advance of the operation of defendants' plan, and that it has been necessary to test that plan with reference to purposes and anticipated consequences without the advantage of the demonstrations of experience. If in actual operation it should prove to be an undue restraint upon interstate commerce, if it should appear that the plan is used to the impairment of fair competitive opportunities, the decision upon the present record should not preclude the Government from seeking the remedy which would be suited to such a state of facts."

and this Court reversed the decree and remanded the case to the District Court with instructions to dismiss the bill without prejudice and that the Court shall retain jurisdiction of the cause and take further proceedings if future developments justify that course in the appropriate enforcement of the Anti-Trust Act.

Thus we have in the *Maple Flooring* case a dissenting opinion by two justices which states that the factual situation between that case and the *American Column* case are identical and the majority of the Court disagreeing upon the factual situation. In the *Appalachian Coals* case, this court, with Mr. Justice McReynolds dissenting, stated that even after a voluminous record had been made that it could not determine whether the factual situation in that case *in advance* of the actual scheme going into operation was violative of the Sherman Anti-Trust Act. How then can a layman or for that matter any laboring man with ordinary school education be called upon to determine, at his peril, by merely a reading of the statute whether the acts that he is going to embark upon, will hold him liable to the criminal penalties of that act. How could Leslie G. Goudie in the instant case, by reading the provisions of the Sherman Act know, that if he did the things that the Government herein charges, as President of the advisory body he counseled, advised and directed others in the advisory body, over whom he had no control to bring his advice, counsel or direction into actual being, that he would be guilty of violating the Sherman Anti-Trust Act.

The standard required to uphold the validity of a civil statute is not as rigid as that required of a penal statute such as the Sherman Anti-Trust Act.

We are aware that this Court has passed upon the validity of this statute in *Nash v. United States*, 229 U. S. 373 (1913), yet this Court in *U. S. v. Cohen Grocery Co.*, 255 U. S. 81, at 92 (1920), said with reference to the *Nash* case and the *Waters-Pierce Oil* case, 212 U. S. 86, which was the basis for the decision of the *Nash* case:

"We need not stop to review them (referring to the *Nash* and the *Waters-Pierce* cases); however, first because their inappositeness is necessarily dem-

onstrated when it is observed that if the contention as to their effect were true, it would result, in view of the text of the statute, that no standard whatever was required, no information as to the nature and cause of the accusation was essential, and that it was competent to delegate legislative power in the very teeth of the settled significance of the Fifth and Sixth Amendments and of other plainly applicable provisions of the constitution."

The Sherman Anti-Trust Act prohibits "every" contract combination or conspiracy in restraint of interstate trade, yet this Court has said:

"Every agreement concerning trade, every regulation of trade, restrains." (*Appalachian Coals* case, 288 U. S. 344 at 361)

and the Court continued on and said that this is not a sufficient thing to bring it within the condemnation of the statute. If a transaction should result in influencing prices or reducing the number of competitors it might logically be considered a contract in restraint of interstate commerce. So would a combination to urge citizens in one city to patronize only home industries restrain interstate commerce. It is clear that such a literal construction of the act is both undesirable and dangerous and this Court has pointed out in *Appalachian Coals* case on page 361 that:

"In applying this test, a close and objective scrutiny of particular conditions, and purposes is necessary in each case. Realities must dominate the judgment. The mere fact that the parties to an agreement eliminate competition between themselves is not enough to condemn it. The legality of an agreement or regulation cannot be determined by so simple a test, as whether it restrains competition."

So this court, in a series of decisions, recognizes that not every contract affecting interstate commerce should

be considered unlawful, but only those whose effect was direct and not too small to be taken into account should be so regarded. (See *Hopkins v. The United States*, 171 U. S. 578; *Anderson v. United States*, 171 U. S. 604.)

The Sherman Act mentioned neither the size of the restraint nor the directness of its effect on interstate commerce. It prohibited every "such restraint". This court, in declining to condemn every restraint laid down the policy that every restraint must be judged by itself. Was it direct? Was it important? Was it intentional? In order to decide a case this court had to set up some standard of judgment apart from the mere existence of restraint itself. As applied to cases that have been brought before into the courts for injunctive relief, there is less danger for the application of the rule of reason than in the instant case which involves a criminal charge. A legislative Act which involves the forfeiture of a person's freedom by providing for punishment by imprisonment and fine should be such that anyone examining the act may be reasonably apprised as to which acts would be in violation of the act and which were not. He should not be guessed into being branded a criminal and it should not be left to the whim and determination of a jury as to whether acts done by a person which he considered legal did not meet with the same conclusion of a jury.

### **CONCLUSION.**

It is the sincere prayer and appeal of labor to this court to free them from the unnatural and unintentional restraints placed upon them by the decisions of this court in its erroneous assumption that it was the intention of Congress that labor unions should be included within the purview of the anti-trust act, and

that this court should hold that the true intent and purpose of Congress was to exclude from the operation of the Sherman Anti-Trust Act and of the Clayton Act, labor unions, and through a proper interpretation of those acts will this court truly render a new *magna charta* for labor as was the belief when the Clayton Act was passed.

Respectfully submitted,

DANIEL D. CARMELL,

*Attorney for Leslie G. Goudie.*

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IN THE  
**Supreme Court of the United States**

OCTOBER TERM, 1939

**No. 397**

UNITED STATES OF AMERICA,

*Appellant,*

*vs.*

THE BORDEN COMPANY, ET AL.,

*Appellees.*

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR  
THE NORTHERN DISTRICT OF ILLINOIS, EASTERN DIVISION.

BRIEF FOR PURE MILK ASSOCIATION, A CORPORATION, DON N.  
GEYER, EDWARD F. COOKE, E. E. HOUGHTBY, F. J. KNOX,  
LOWELL D. ORANGER, AND JOHN P. CASE, APPELLEES.

EDWARD J. HENNESSY,  
✓ WILLIAM C. GRAVES,  
✓ HARVEY E. WOOD,  
✓ MARTIN BURNS,

*Attorneys for Pure Milk Association, a corporation, Don N. Geyer, Edward F. Cooke, E. E. Houghtby, F. J. Knox, Lowell D. Oranger and John P. Case, Appellees.*

SCHUYLER & HENNESSY,

C. ERNEST HEATON,

DANIEL M. SCHUYLER,

*Of Counsel.*

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IN THE  
**Supreme Court of the United States**

OCTOBER TERM, 1939.

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No. 397

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UNITED STATES OF AMERICA,

*Appellant,*

*vs.*

THE BORDEN COMPANY, ET AL.,

*Appellees.*

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APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR  
THE NORTHERN DISTRICT OF ILLINOIS, EASTERN DIVISION.

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BRIEF FOR PURE MILK ASSOCIATION, A CORPO-  
RATION, DON N. GEYER, EDWARD F. COOKE,  
E. E. HOUGHTBY, F. J. KNOX, LOWELL D.  
ORANGER, AND JOHN P. CASE, APPELLEES.

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OPINION BELOW.

The District Court filed an opinion sustaining motions to quash and demurrers to the Indictment on July 13, 1939 (R. 98-113). The opinion is reported in 28 F. Supp. 177 (Advance Sheet).

**JURISDICTION.**

The Government seeks to invoke jurisdiction in this Court by direct appeal from the District Court under the provisions of The Criminal Appeals Act of March 2, 1907, c. 2564, 34 Stat. 1246, 18 U. S. C. A. 682. The order and judgment appealed from was entered on July 28, 1939 (R. 114-118). The order allowing appeal was entered in the District Court on August 17, 1939 (R. 94-95). On October 16, 1939 this Court postponed further consideration of the question of jurisdiction to the hearing of the case upon the merits.

## QUESTIONS PRESENTED.

1. Whether or not this Court has jurisdiction of this appeal under The Criminal Appeals Act.
2. Whether or not the Agricultural Adjustment Act of May 12, 1933, as amended, and as re-enacted and amended by the Agricultural Marketing Agreement Act of 1937, removes the production and marketing of milk from the purview of Section 1 of the Sherman Act.
3. Whether or not Section 6 of the Clayton Act and the Capper-Volstead Act excepts and exempts Pure Milk Association, its officers, agents and employees, from prosecution by indictment under the penal provisions of Section 1 of the Sherman Act.
4. Whether or not Section 6 of the Clayton Act, the Capper-Volstead Act, and the Agricultural Adjustment Act of May 12, 1933, as amended and as re-enacted and amended by the Agricultural Marketing Agreement Act of 1937, construed together with the Cooperative Marketing Act of June 1926, the Agricultural Marketing Act of June 15, 1929 and the Robinson-Patman Act of June 19, 1936 excepts and exempts Pure Milk Association, its officers, agents and employees, from prosecution by indictment under the penal provisions of Section 1 of the Sherman Act.

## STATUTES INVOLVED.

- The Sherman Act of July 2, 1890, c. 647, 26 Stat. 209, as amended by the Act of August 17, 1937, c. 690, 50 Stat. 693, 15 U. S. C. 1.—Appendix A.
- The Clayton Act of October 15, 1914, c. 323, 38 Stat. 730, 15 U. S. C. A. 17.—Appendix B.
- The Capper-Volstead Act of February 18, 1922, c. 57, 42 Stat. 338, 7 U. S. C. A. 291.—Appendix C.
- The Cooperative Marketing Act of June 15, 1926, 44 Stat. 802, 7 U. S. C. A. 451.—Appendix D.
- The Agricultural Marketing Act of June 15, 1929, 46 Stat. 388, 12 U. S. C. A. 1141.—Appendix E.
- The Agricultural Adjustment Act of May 12, 1933, c. 25, 48 Stat. 31, as amended August 24, 1935, c. 641, 49 Stat. 750, 7 U. S. C. A. 601.—Appendix F.
- The Agricultural Marketing Agreement Act of 1937, c. 296, 50 Stat. 246, 7 U. S. C. A. 601.—Appendix G.
- The Robinson-Patman Act of June 19, 1936, 49 Stat. 1526, 15 U. S. C. A. 13.—Appendix H.

The pertinent provisions of all the statutes involved are printed in the Appendix of this brief.

## STATEMENT OF THE CASE.

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An Indictment in four counts charging a combination and conspiracy to restrain trade and commerce in the production, marketing and distribution of milk (R. 1-30), in violation of Section 1 of the Sherman Act of 1890, was returned in the United States District Court for the Northern District of Illinois, Eastern Division, on November 1, 1938. The Indictment was suppressed until November 15, 1938 (R. 135). Included among the defendants were Pure Milk Association, a duly incorporated organization of milk producers (R. 7) and six individuals associated with or employed by the defendant Pure Milk Association (R. 8). The Indictment charges these six individuals with having authorized, ordered or performed the acts charged against Pure Milk Association as constituting the offenses charged against it in the Indictment (R. 8, 10). Count One of the Indictment charges an unlawful combination and conspiracy to fix, maintain and control artificial and non-competitive prices to be paid producers of milk, (R. 11); Count Two, an unlawful combination and conspiracy to fix and maintain uniform, arbitrary and non-competitive prices for the sale of milk by distributors, (R. 17); Count Three, an unlawful combination and conspiracy to control the method of distributing milk in the City of Chicago; (R. 21) and Count Four, an unlawful combination and conspiracy to restrict, limit and control the supply of fluid milk coming into the City of Chicago (R. 25).

This group of appellees on January 7, 1939 filed a joint and several motion to quash and demurrer to the Indictment (R. 77-85). This motion to quash and demur-  
rer, among other things, revealed Pure Milk Association to be a non-profit cooperative agricultural association of milk producers, incorporated without capital stock and

upon a not for profit basis under the provisions of the Agricultural Coopérative Act of the State of Illinois and that the Association was instituted for the mutual benefit of its members as producers of milk for the purpose of promoting the general welfare of its members as such producers and the business of dairying in the Chicago fluid milk district (R. 81-82). The motion to quash and demurrer contained appropriate references to show that such Association was operated for the mutual benefit of its members as producers of milk; that no member of the Association is allowed more than one vote; that it does not pay dividends on stock or membership capital in excess of eight per centum per annum and that the Association does not deal in the products of non-members to an amount greater in value than such as are handled by it for members (R. 82; Brief for the U. S. p. 56). The motion to quash and demurrer was duly acknowledged and sworn to (R. 85).

On July 13, 1919 Honorable Charles E. Woodward, Judge of the District Court, filed his opinion holding that price fixing was the essence of Counts One, Two and Four of the Indictment (R. 105) and that Count Three was bad for duplicity in that the count charges at least four distinct and separate conspiracies and the demurrs to all counts of the Indictment should be sustained because of the construction and interpretation to be given certain special acts of Congress passed subsequent to the Sherman Act of 1890 (R. 98-114). On July 28, 1939 a formal order and judgment was entered by the District Court following his opinion sustaining the demurrer and motion to quash of these appellees as to all counts of the Indictment, upon the ground that no Indictment will lie under Section 1 of the Sherman Act because the special statutes relied upon by them, when properly construed, except and exempt Pure Milk Association, together with its officers and agents, from prosecution under Section 1 of the Sherman Act (R. 114-118).

## SUMMARY OF ARGUMENT.

The order and judgment appealed from is based upon the construction of certain special statutes which have been enacted by Congress since the adoption of Section 1 of the Sherman Act, the statute upon which the Indictment is founded. These special statutes have been enacted by Congress under its expressed purpose of favoring, fostering, promoting and encouraging the organization of farmers, including dairymen, into associations under their own control and to provide the procedure to be followed by the Government in supervising, regulating and controlling their activities in interstate and foreign commerce and thus advance the economic welfare of producers and stabilize the markets for agricultural products in the interest of and for the general public welfare.

Congress has repeatedly recognized the essential distinguishing differences between the type of organization advantageous to producers of agricultural products, including dairymen, as compared to associations of other persons, trade associations and ordinary business corporations employed in other industries. Under its continuing authority to regulate, supervise and control the activities in interstate and foreign commerce of the organizations so recognized, Congress has enacted new and special statutes for the purpose of supervising, regulating and controlling the activities of such organizations and has provided new and exclusive remedies and procedure to be followed for the protection of the public from alleged violations of the exemptions and exceptions thus conferred, as distinguished from the procedure under Section 1 of the Sherman Act adopted nearly fifty years ago.

It will serve no useful purpose or help this Court to make an extensive summary of the argument of these appellees as presented under Points II and III of this brief.

No dispute is made of the fact that Pure Milk Association, its officers, agents and employees, is an organization falling within the class recognized by Congress in the enactment of these special statutes (See Government's Brief, p. 56), and with respect to these appellees, Congress has provided a complete, full and adequate remedy for the protection of the public from the things complained of in the Indictment.

## ARGUMENT.

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### I.

#### JURISDICTION.

On September 2, 1939 these appellees filed a statement against jurisdiction for this appeal, asserting that the decision or judgment appealed from is not based upon the invalidity or construction of the statute upon which the indictment is founded, Section 1 of the Sherman Act (Appendix A), but upon the interpretation of the several *special* acts of Congress passed subsequently thereto (Appendices B to H inclusive), and further that the decision or judgment appealed from is not a decision or judgment sustaining a special plea in bar because the statutes upon which these appellees rely to support their Demurrer and Motion to Quash provides the United States of America new and different remedies exclusive and in lieu of initial criminal proceedings to correct the wrongs complained of in the Indictment. The statement opposing jurisdiction on behalf of these appellees has been printed as a part of the record on this appeal, and sets forth the position of these appellees with respect to the question of jurisdiction.

## II.

**THE CAPPER-VOLSTEAD ACT IS A SPECIAL STATUTE CLASSIFYING FARMERS' COOPERATIVE ASSOCIATIONS UNDER THE POWER OF CONGRESS TO CLASSIFY, TO GRANT EXCEPTIONS AND EXEMPTIONS TO SUCH CLASS, TO PROVIDE FOR THE PROCEDURE TO BE TAKEN BY THE GOVERNMENT IN REGULATING RESTRAINTS ON INTERSTATE COMMERCE, AND SUCH ACT IS ENTITLED TO PREFERENCE OVER THE GENERAL STATUTE, NAMELY, SECTION 1 OF THE SHERMAN ANTI-TRUST ACT.**

With the general proposition asserted in the Government's Brief at page 23 to the effect that Section 1 of the Sherman Act inhibits contracts, combinations or conspiracies in restraint of trade, provided the restraint is unreasonable, we have no controversy. We submit, however, that the general prohibitions of Section 1 of the Sherman Act with respect to the activities and operations of an agricultural association composed of farmer-producers has been modified by later enactments of Congress by way of *special legislation*, among others, the Capper-Volstead Act, and that it must necessarily, as the lower court found, be construed in the light of these later enactments.

It must be admitted that Section 1 of the Sherman Act under which the Government seeks to prosecute Pure Milk Association, its officers, agents and employees, by indictment is pre-eminently a *general statute* protecting interstate trade and commerce from unlawful restraints and is the only section of the Sherman Anti-Trust Law under consideration.

It must also be conceded that the succeeding Acts hereinabove referred to are special congressional provisions which provide for exceptions as to farmers and cooperative associations dealing in farm commodities. These Acts being of a special and particular nature making exceptions and exemptions applicable to only a certain class of persons,

the question arises whether the construction to be placed upon these acts regarding the matters upon which Congress has attempted to legislate, shall be given preference over and above the general provisions of Section 1 of the Sherman Act.

This theory of law is sustained in the case of *Price v. United States*, 74 Fed. (2d) 120, where the Court said at page 120:

“The particular is entitled to preference over the general statute.”

To the same effect is the case of *Baltimore Nat. Bank v. State Tax Commission of Maryland*, 297 U. S. 209, decided February 3, 1936, where Justice Cardozo, delivering the opinion of the Court, at page 215 said:

“It is a well settled principle of construction that specific terms covering the given subject matter will prevail over general language of the same or another statute which might otherwise prove controlling. *Kepner v. United States*, 195 U. S. 100, 125, 24 S. Ct. 797, 803, 49 L. Ed. 114, 1 Ann. Cas. 655; cf. *Ginsberg & Sons v. Popkin*, 285 U. S. 204, 208, 52 S. Ct. 322, 76 L. Ed. 704; *In re East River Towing Co.*, 266 U. S. 355, 367, 45 S. Ct. 114, 69 L. Ed. 324; *Washington v. Miller*, 235 U. S. 422, 428, 35 S. Ct. 119, 59 L. Ed. 295; *Rosecrans v. United States*, 165 U. S. 257, 262, 17 S. Ct. 302, 41 L. Ed. 708; *Town of Red Rock v. Henry*, 106 U. S. 596, 603, 1 S. Ct. 434, 27 L. Ed. 251.”

To the same effect is *United States v. Hess*, 71 Fed. (2d) 78, where the Court at page 79 said:

“Where there are two or more statutes upon the same subject, one general and the other special, the special statute is recognized as an exception to the generality of the other statute without regard to priority of enactment.” (Citing authorities.)

It is clear, therefore, in view of the fact that Section 1 of the Sherman Act is a general provision and that the subsequent acts referred to in this brief are special and par-

ticular acts having for their purpose certain well defined objectives creating a new public policy of Congress, farmers' cooperative associations for the marketing of farm commodities, are relieved from *initial prosecution* by indictment under Section 1 of the Sherman Act. (See Discussion, *infra*, Point III, p. 26.)

It is admitted that Section 1 of the Sherman Act is nothing more than a general statute "sweeping and unqualified" as is said by the Government. The mere fact that it is "sweeping and unqualified", yet general in its provisions, clearly brings the same within the well-settled principle of law that *special statutes take precedent over a general statute* involving the same matter which, in this case, is the restraint of trade and commerce among the several states. *The real question is, what is the effect and purpose of the subsequent acts*, all of which are *special statutes* providing for exceptions and exemptions relative to the application of the anti-trust laws and their application to farmers relative to the production, marketing and sale of their farm commodities. These special statutes were enacted by the Congress for the purpose of encouraging farmers and fostering cooperative associations among producers, and providing the procedure that is to be taken by the Government in case such societies or persons so exempted abuse their rights and unlawfully restrain trade in interstate commerce. The lower court construed these subsequent acts to be *special statutes* and correctly applied them as *having precedence* over the more general Section 1 of the Sherman Act.

In thus giving force and effect to the special statutes, the lower court in its order and judgment held that under a proper construction of the Capper-Volstead Act, among others, an agricultural cooperative association, together with its officers and agents, are exempt from prosecution under Section 1 of the Sherman Act (R. 114).

While the Government at page 24 of its brief asserts that it is clear that the acts charged in the indictment are illegal under the Sherman Act, yet sight is apparently lost of the fact that the District Court in its opinion (R. 105) referring to Counts I, II and IV of the Indictment determined that "*price fixing is the essence of these counts.*" This Court is bound by this interpretation of the Indictment. *United States v. Hastings*, 296 U. S. 188, 192-194; *United States v. Colgate & Company*, 250 U. S. 300. Consequently, this Court is confined to a review of the construction of the general statute as modified or altered by a *later special statute*, and may not concern itself with the individual charges contained in the Indictment, but must accept the District Court's interpretation of those charges.

Price fixing being the essence of these three counts of the Indictment, this case in so far as Pure Milk Association, its officers and agents are concerned, comes squarely within the regulatory provisions of Section 2 of the Capper-Volstead Act, and by virtue of the *remedial provisions and procedure* there provided, no prosecution will lie under Section 1 of the Sherman Act. Count III of the Indictment is not here involved for the reason that the lower court dismissed this count on grounds other than the construction of the statutes involved.

In Section 2 of the Capper-Volstead Act, Congress provides a new remedy in the case of agricultural cooperative associations relating to violations of law which might otherwise have come under Section 1 of the Sherman Act. Not only was the remedy new, but it likewise was exclusive. In other words, the Secretary of Agriculture, *an administrative officer of the executive department of the Government*, was given authority to initiate proceedings against an agricultural cooperative association when he has reason to believe that such an association monopolizes or restrains trade in interstate commerce. The procedure to be followed is

clearly prescribed by the statute. He is required and it is his duty to file a complaint against the Association, provide for a hearing, and upon the evidence adduced at such hearing, the Secretary is empowered to enter a cease and desist order against the Association directing it to cease and desist from monopolization or restraint of trade in the event his findings on the evidence disclose that the Association is guilty of the charge stated in the Secretary's complaint. Thereafter, the respondent association may, or the Secretary shall, if the association fails to comply with his order, file in the Federal District Court a certified copy of his order and all records of the proceedings. Thereupon, a regular judicial proceeding is instituted and the Attorney General is required to prosecute the case. On such hearing, the Court may take further evidence and enter a decree either affirming, modifying, or setting aside the Secretary's order, or enter such other decree as the Court may deem equitable.

This procedure may appear to be new, yet it is not novel. A direct analogy is disclosed in the jurisdiction and authority of the Interstate Commerce Commission over railroad corporations and the United States Shipping Board over maritime corporations. The Shipping Act which created the last mentioned board has been expressly held by this Court to supersede the Anti-Trust laws to the extent that the Shipping Act affords specific remedies to redress alleged wrongs, otherwise, cognizable by the courts under the Sherman Act. This is no less true of the Interstate Commerce Act, and we submit that it is likewise true of Section 2 of the Capper-Volstead Act.

This is well illustrated by the case of the *United States Navigation Company, Inc. v. Cunard Steamship Co., Ltd.*, 284 U. S. 474, 52 Sup. Ct. 247. Therein, a suit was brought for an injunction under the Sherman Anti-Trust Act and the Clayton Act to restrain a group of steamship companies

from continuing a conspiracy in restraint of trade and commerce. The acts charged to be illegal in the complaint fell within the expressed prohibitions of the Federal Shipping Act or as this Court pointed out, the charges in the complaint were in effect, even if not in terms, the component part of those prohibitions (p. 485). It was held by this Court that the plaintiff navigation company must seek redress by application to the United States Shipping Board and not relief under the Sherman Act. To like effect, but instead, dealing with the jurisdiction and authority of the Interstate Commerce Commission, see *Terminal Warehouse Company v. Pennsylvania R. Co., et al.*, 297 U. S. 500, 56 S. Ct. 546, (p. 551). As the Court points out (p. 514) "*Certain then it is that the Anti-Trust Laws are inapplicable in all their apparent breadth to carriers by rail or water.*"

In other words, this Court recognized in these comparatively recent decisions, the last mentioned being in 1936, that there were certain exceptions to the remedial provisions of the Anti-Trust laws whereby certain wrongs came within the exclusive jurisdiction of either the Interstate Commerce Commission or the United States Shipping Board.

This is precisely the situation in the case at bar. The alleged wrongs charged against Pure Milk Association, its officers and agents, in the indictment in this appeal, as construed by the lower court, are such as come exclusively within the jurisdiction of the Secretary of Agriculture subject to review by the courts. If the alleged acts of these appellants have restrained interstate trade and commerce, the Government has mistaken its remedy as to them.

Under the provisions of Section 2 of the Capper-Volstead Act, it was the duty of the Secretary of Agriculture to initiate proceedings against Pure Milk Association if he had reason to believe that such Association had restrained trade to such an extent that the price of milk

was thereby unduly enhanced and in no event could a criminal prosecution lie under Section 1 of the Sherman Act on the basis of the acts charged against Pure Milk Association in the Indictment before this Court in the instant appeal.

That this theory of the Capper-Volstead Act was embraced in the District Court's decision is evidenced at the point in the opinion where more detailed attention is given to the Capper-Volstead Act as one Act of Congress showing a definite trend in public policy toward the encouragement, promotion and regulation of agricultural cooperative associations. It is further evidenced by the fact that the appellees, Pure Milk Association, its officers and agents, at paragraphs 5, 6, 7 and 10 of their Demurrer and Motion to Quash pointed out, and the District Court had under consideration, allegations and averments to the following effect (R. 78-79; 105-106): That the charges contained in the indictment depart from the due and orderly process of law intended and provided for by existing acts of Congress relating particularly to producers of agricultural products and their collective efforts in marketing their products, and that the Government's procedure by way of indictment completely ignores provisions made in such laws for the determination and correction of the evils, misuses or transgressions by an agricultural association, such as the appellee, Pure Milk Association.

The Government's procedure by way of indictment further ignores all later enacted and presently existing supplementary federal and state laws authorizing the creation and operation of agricultural cooperative associations by persons engaged in the production of agricultural products as farmers and corollary acts of Congress especially designed to regulate the conduct of such associations and organizations, with respect to both monopolization and

restraint of interstate trade. It further ignores that these later enactments do not provide for, nor is there warranted under them any choice or election of remedy by way of indictment or complaint in respect to the application of the anti-trust laws to such associations or to correct the evils, misdirections or transgressions which may be attributed to such associations. It ignores a substituted procedure intended to apply corrective measures as outlined in Section 2 of the Capper-Volstead Act. The procedure there outlined is primary and exclusive and contemplates a complaint by an administrative officer, a hearing, the introduction of testimony and the issuance of a proper administrative order. Such an order, based upon the evidence, is one directed against an erring association requiring that it cease and desist from monopolization and restraint of trade. Thereafter, the entire procedure is subject to review by the Federal courts and the Attorney General is required to prosecute the cause. The court's jurisdiction is such as permits the entry of any appropriate order. Yet, despite this clear procedure specified by Congress, the Government has ignored the same in proceeding by indictment. The lower court has held such procedure to be in error and in effect, that the Government's remedy against the appellees, Pure Milk Association, its officers and agents, if any remedy be required, *on the evidence*, is specified and prescribed in Section 2 of the Capper-Volstead Act.

The Government relies upon numerous cases in support of the proposition that the Sherman Act "applies to interstate commerce in agricultural products, such as milk". These cases will be individually discussed hereinafter, and we submit that an analysis of these decisions conclusively shows that they have no application to the case at bar. Most of these cases were decided either by

this Court or inferior Federal courts prior to the enactment of the Capper-Volstead Act. In none of these cases was the Capper-Volstead Act involved as an issue before the court, and in none of them was an association of agricultural producers involved as defendants, either under indictment or complained against in a chancery proceeding.

We contend that these cases are not authority for the proposition for which they are cited by the Government, and that Section 1 of the Sherman Act has been superseded by the later enactment, the Capper-Volstead Act of 1922, with respect to the collective marketing of agricultural products, including milk, in interstate commerce by a cooperative association of agricultural producers.

The first of these cases, viz., *Swift & Company v. United States*, 196 U. S. 375 was decided as early as 1905 and involved an indictment which charged the illegal combination of dealers not livestock producers in fresh meat to fix prices and stifle competition. In this category may be placed such other decisions cited as *United States v. Kissel*, 218 U. S. 601 decided December 12, 1910, *United States v. Swift & Company, et al.*, 188 F. 92, decided May 12, 1911, *Nash v. United States*, 229 U. S. 373, decided June 9, 1913, *United States v. Whiting, et al.*, 212 F. 466, decided March 23, 1914, *United States v. King*, 229 F. 275, decided October 23, 1915, *United States v. King*, 250 F. 908, decided April 25, 1916, *United States v. Corn Products Refining Company, et al.*, 234 F. 964, decided in June, 1916 and *United States v. M. Piowaty & Sons, et al.*, 251 F. 375, decided in September, 1917.

In the *Nash* case *supra* the conspiracy charged in the indictment was against certain shipping and warehouse companies engaged in buying, selling, shipping, exporting and warehousing turpentine. The object of the conspiracy

was alleged to be the driving of competitors out of business and the monopolization and restraint of trade. The case involved neither farm cooperatives nor those dealing in farm commodities. The *Kissel* case, *supra*, was likewise a criminal proceeding wherein the indictment charged an unlawful conspiracy to restrain trade in refined sugar. Sugar producers were not defendants in the case. *United States v. Swift; et al., supra*, was a proceeding by way of indictment against the Swift Company and others engaged in the packing business. Live stock producers were not involved. *United States v. King*, 229 F. 275 concerned an indictment which, on its face, failed to show that agricultural producers comprised the defendant association which was under indictment for restraint of trade. The later *King* case, *supra*, involved an indictment under the Sherman Act and the Court pointed out that the defendant association, so far as the indictment showed, was not composed of agricultural producers, and that, therefore, the defendants could not invoke the protection afforded by Section 6 of the Clayton Act of 1914. The *Corn Products* case, *supra*, an equity proceeding under the Sherman Act, involved manufacturers of corn products and not the producers. The *Piowaty & Sons* case, *supra*, involved "middlemen" as distinguished from agricultural producers. The *Whiting* case, *supra*, was a criminal proceeding charging milk dealers in Boston with an alleged conspiracy. Milk producers were not parties defendant.

In *Sugar Institute, Inc., et al. v. United States*, 297 U. S. 553, decided March 30, 1936, a trade association which was alleged to restrain interstate trade in violation of the Sherman Act was the subject of an action in chancery. Sugar producers were not parties defendant, nor was the Capper-Volstead Act in issue. The case of *Greater New York Live Poultry Chamber of Commerce v. United States*, 47

F. (2d) 156, decided January 12, 1931, dealt with an indictment against a *trade association* whose members purchased live poultry from commissionmen for sale in the Metropolitan New York area. Producers of poultry were not under indictment in the case nor was the Capper-Volstead Act in issue. The same may be said in respect to *Live Poultry Dealers' Protective Association v. United States*, 4 F. (2d) 840, decided December 2, 1924. Therein poultry dealers and local agents formed a *trade association* to establish and maintain prices on poultry, entering the New York market, and their activity was enjoined under the Sherman Act. There again poultry producers were not parties defendant in the case.

It may be said without further equivocation that these cases are not authority for the proposition that the Sherman Act applies to the marketing of milk in interstate commerce by the Pure Milk Association, an agricultural cooperative association, organized under the cooperative laws of the State of Illinois, and as the Government admits, meets all of the qualifications of the Capper-Volstead Act (p. 56, Government's Brief).

Numerous other cases are cited by the Government in support of its theory that the Sherman Act as originally passed did not exempt farmers and their associations from criminal prosecution under Section 1 of the Sherman Act. None of these cases are in point on the question at issue and not a single one of them has anything to do with the construction to be placed upon the acts of Congress which have been enacted since the adoption of the Sherman Act in the effort Congress has exerted to aid and assist producers of farm products in the solution of the serious economic problems with which they are constantly confronted. In most instances these cases were proceedings in equity under the Sherman or Clay-

ton Acts and in none of the decisions was the Court considering an indictment against an agricultural cooperative association, its members, officers or employees.

*Addyston Pipe & Steel Company v. United States*, 175 U. S. 211, decided December 4, 1899, was a suit in chancery instituted upon behalf of the United States in an effort to obtain an injunction perpetually restraining six corporations who were engaged in the manufacture, sale and transportation of iron pipe from continuing a combination alleged to have been entered into between them in restraint of trade and commerce as prohibited by the Sherman Act.

*Loewe v. Lawlor*, 208 U. S. 274, decided February 3, 1908, was a civil action filed under Section 7 of the Sherman Act in an attempt by the plaintiff to recover three-fold damages for injuries alleged to have been inflicted by action of the defendants through a combination or conspiracy declared to be unlawful by the Act.

*Standard Oil Company of New Jersey v. United States*, 221 U. S. 1, decided May 15, 1911, was a suit in equity filed to review a decree dissolving a holding company on a charge it existed in violation of the anti-trust laws.

The case of *Gompers v. Buck's Stove & Range Co.*, 221 U. S. 418, decided May 15, 1911, came to this Court on a writ of certiorari to the Court of Appeals for the District of Columbia to review a judgment affirming a judgment of the Supreme Court of the District, punishing an alleged contempt of an injunction against the continuance of a boycott by a sentence of imprisonment. The question involved was whether or not the defendant was guilty of contempt of court.

*United States v. American Tobacco Company*, 221 U. S. 106, decided May 29, 1911, was an action instituted by the United States to prevent the continuance of alleged

violations of the first and second sections of the Sherman Act.

The case of *Standard Sanitary Mfg. Co. v. United States*, 226 U. S. 20, was decided November 18, 1912. It was an appeal taken from a decree entered in the lower court in favor of the Government against sixteen corporations and thirty-four individual defendants, all but one of whom were officials of the corporations. The defendants were manufacturers of enamel iron wire in various places in the United States, controlling approximately 85% of such wire, and engaged in both interstate and foreign commerce. This was a chancery proceeding and also involved certain patents.

*United States v. Union Pacific R. R. Co.*, 226 U. S. 61, decided December 2, 1912, was a civil proceeding in equity to restrain the railroad company from doing certain things claimed to be unlawful under the Sherman Act.

The case of *United States v. Patten*, 226 U. S. 525, decided January 6, 1913, was a criminal proceeding instituted by the filing of an indictment charging violations of the Sherman Anti-Trust Law. It came to this Court upon an appeal by the Government to review a judgment of the Circuit Court sustaining a demurrer to the indictment. The case involved a conspiracy to corner the market of the available supply of cotton throughout the United States through purchases for future delivery, coupled with withholding sales in the market for a limited time.

The evidence in this case showed that James A. Patten and others were engaged in a *speculative gambling proposition*, the purpose of which was to control the price of cotton in the entire United States by gambling in futures, and either inflate or deflate the price above or below normal, and thus injure the public.

*Eastern States Retail Lumber Dealer's Assn. v. United States*, 234 U. S. 600, decided June 22, 1914, came up on an appeal from a decree by the Government under the Sherman Act. The object of the suit was to secure an injunction against certain alleged combinations of retail lumber dealers which, it was claimed, had entered into a conspiracy to prevent wholesale lumber dealers from selling lumber directly to consumers.

All of the foregoing cases were decided prior to the adoption of the Clayton Act by Congress and the questions involved arose out of criminal proceedings in only one or two instances.

The case of *Lawlor v. Loewe*, 235 U. S. 522, was decided January 5, 1915. This was a mere civil proceeding filed by one individual against another for damages claimed under the provisions of the Clayton Act. The suit involved members of a labor organization and charged a combination or conspiracy to compel the plaintiff to unionize its factory through the use of a boycott.

The case of *United States v. Reading Company*, 253 U. S. 26, decided April 26, 1920, was an appeal from a decree entered in an equitable proceeding instituted by the Government for the purpose of dissolving the inter-corporate relationship existing between the defendants. It was alleged that such relationship constituted a combination in restraint of interstate commerce in anthracite coal and an attempt to monopolize such trade and commerce in violation of Sections 1 and 2 of the Sherman Act.

*Duplex Printing Press Company v. Deering, et al*, 254 U. S. 443, decided January 3, 1921, was a suit in equity seeking an injunction to restrain a course of conduct carried on by the defendants in maintaining a boycott against the products of complainant's factory. No indictment or criminal prosecution was involved.

*American Column Co. v. United States*, 257 U. S. 377, was decided December 19, 1921. It arose out of a bill in chancery charging that the American Hardwood Manufacturers Association was an unincorporated company following a consolidation of two similar associations composed of approximately 365 members operating 465 mills, operating under what was known as a Plan. The complaint charged that the Plan constituted a combination and conspiracy to restrain interstate commerce in hardwood lumber through restriction of competition and the maintenance of prices prohibited by the Sherman Act. While this case did involve an unincorporated trade association, the members thereof were not producers or farmers, and the decision, as in all of the foregoing cases, was handed down prior to the passage of the Capper-Volstead Act by Congress. The case has no bearing upon the question of whether or not the farm cooperative associations, their members, officers and employees, are excepted from criminal prosecution under Section 1 of the Sherman Act.

The case of *United States v. American Oil Company*, 262 U. S. 371, decided June 4, 1923, did not involve an indictment or a criminal prosecution. It arose out of a bill in equity filed against the defendants, consisting of twelve corporations operating in several different states, demanding that they be restrained from further interfering with interstate trade and commerce in linseed oil, cake and meal as declared unlawful by the Sherman Act.

The case of *Binderup v. Pathé Exchange*, 263 U. S. 291, decided November 19, 1923, was a civil proceeding in equity under the provisions of Section 7 of the Sherman Act.

The case of *United States v. Brims*, 272 U. S. 549, decided November 23, 1926, was a criminal proceeding arising from an indictment against William F. Brims and

others and came up on an appeal from judgment of conviction for engaging in a combination and conspiracy in restraint of trade as prohibited by the Sherman Act. The commodity involved was building materials and the question upon appeal was whether or not there was a fatal variance between the allegations and proof of the indictment.

*United States v. Trenton Potteries*, 273 U. S. 392, decided February 21, 1927, was also a criminal proceeding arising out of an indictment against twenty-three corporations and twenty individuals, charging violations of the Sherman Act. Evidence in the case revealed that the defendants were engaged in and controlled the manufacture and distribution of 82% of the vitreous pottery fixtures made in the United States for use in bathrooms and lavatories. None of the defendants were engaged in agricultural pursuits nor did the commodities involved include agricultural products.

The decision in *Local 167 v. United States*, 291 U. S. 293 decided February 5, 1934, arose out of an appeal from an injunction against a conspiracy claimed to have been commenced by the appellant and others in May, 1927, to restrain and monopolize interstate trade and commerce in live and freshly dressed poultry in violation of Sections 1 and 2 of the Sherman Act. This was not a criminal proceeding.

The Government's proposition that the acts charged in the indictment are illegal under the Sherman Act and are not exempt from its application, in so far as these appellants are concerned, wholly ignores the force and effect of the later special statutes enacted since the adoption of the Sherman Law, and the cases cited in support of this proposition in no way assist in the proper construction that should be placed upon the later enactments of Congress.

## III.

**PURE MILK ASSOCIATION IS COMPOSED OF PRODUCER MEMBERS INCORPORATED UNDER THE AGRICULTURAL CO-OPERATIVE ACT OF ILLINOIS, WITHOUT CAPITAL STOCK UPON A NOT FOR PROFIT BASIS, AND ITS METHOD OF OPERATION MEETS THE REQUIREMENTS OF THE CAPPER-VOLSTEAD ACT, UNDER SECTION 2 OF WHICH A COMPLETE REMEDY AS AGAINST THESE APPELLEES IS PROVIDED FOR RELIEF FROM THE THINGS COMPLAINED OF IN THIS INDICTMENT.**

*The decision or judgment appealed from is based upon the application, interpretation of and construction by the court of the force and effect of the following acts:*

- (a) The Clayton Act of October 15, 1914, 38 Stat. 730, *et seq.*, 15 U. S. C. A. 12, *et seq.* Appendix B, p. 70.
- (b) The Capper-Volstead Act of February 15, 1922, 42 Stat. 388, 7 U. S. C. A. 291, 292. Appendix C, pp. 71-73.
- (c) The Cooperative Marketing Act of July 2, 1926, 44 Stat. 802, *et seq.*, 7 U. S. C. A. 451, *et seq.* Appendix D, p. 74.
- (d) The Agricultural Marketing Act of June 15, 1929, 46 Stat. 11, 12 U. S. C. A. 1141, *et seq.* Appendix E, pp. 75-76.
- (e) The Agricultural Adjustment Act of May 12, 1933, 49 Stat. 750, 7 U. S. C. A. 601, *et seq.* Appendix F, pp. 77-78.
- (f) The Agricultural Adjustment Act of May 12, 1933, as amended and re-enacted by the Agricultural Marketing Agreement Act of 1937, 50 Stat. 246, *et seq.*, 7 U. S. C. A. 601, *et seq.* Appendix G, pp. 79-83.
- (g) The Robinson-Patman Act of 1936, 49 Stat. 1526, *et seq.*, 15 U. S. C. A. 13, *et seq.* Appendix H, p. 84.

Beginning with the enactment of the Clayton Act of October 15, 1914, which supplemented the Sherman Anti-

trust Act of 1890, the Congress of the United States initiated a new clearly defined public policy favoring, fostering and promoting the formation, organization and operation of farmers cooperative associations intended to improve the economic status of agriculture as follow:

(a) The Clayton Act *expressly* provides for the existence and operation of agricultural organizations instituted for the purpose of mutual help and not having capital stock or conducted for profit, and such organizations or the members thereof are not to be held or construed to be illegal combinations or conspiracies in restraint of trade.

(b) The Capper-Volstead Act of February 18, 1922 *expressly* authorizes persons engaged in the production of agricultural products, as dairymen, to act together in associations such as Pure Milk Association, in collectively marketing their products in interstate or foreign commerce. "Such associations may have marketing agencies in common; and such associations and their members may make the necessary contracts and agreements to effect such purposes." This Act is fully discussed hereafter.

(c) The Cooperative Marketing Act of July 2, 1926 *expressly* authorizes persons engaged as dairy-men acting together in associations for the marketing of their products in interstate or foreign commerce to acquire, exchange, interpret and disseminate past, present and prospective crop, market, statistical, economic and other similar information by direct exchange between them or such associations.

(d) By the adoption of the Agricultural Marketing Act entitled "An Act to establish a Federal Farm Board, to promote the effective merchandising of agricultural commodities in interstate and foreign

commerce, and to place agriculture on a basis of economic equality with other industries" as adopted on June 15, 1929, *it is declared to be the public policy of Congress to promote the effective merchandising of agricultural commodities in interstate and foreign commerce so that agriculture will be placed on a basis of economic equality with other industries, and to that end to protect, control and stabilize the currents of interstate and foreign commerce in the marketing of agricultural commodities and other food products—*

(I) By minimizing speculation,

(II) By preventing inefficient and wasteful methods of distribution,

(III) By encouraging the organization of producers into associations under their control for greater unity of effort in marketing, and by promoting a farm marketing system of producer owned and controlled cooperative associations, and

(IV) By aiding in preventing and controlling surpluses in any agricultural commodity.

It is now left to the Farm Credit Administration to execute the powers vested in it in such manner as will in the judgment of the Administration aid to the fullest practicable extent in carrying out the policy above declared.

(e) In the enactment of the Agricultural Adjustment Act of 1933, as subsequently reenacted, Congress declared that the disruption of the orderly exchange of commodities in interstate commerce impairs the purchasing power of farmers and destroys the value of agricultural assets which support the national credit structure, and these conditions affect transactions in agricultural commodities *with a national public interest*, and burden and obstruct the normal channels of interstate commerce. It is also

thereby declared to be the *policy* of Congress through the exercise of the *powers conferred upon the Secretary of Agriculture to establish and maintain such orderly marketing conditions for agricultural commodities in interstate commerce as will establish prices to farmers at a level that will give agricultural commodities a purchasing power with respect to articles that farmers buy equivalent to the purchasing power of agricultural commodities in the base period as therein defined, and to protect the interests of consumers through powers therewith conferred upon the Secretary of Agriculture.*

(f) Under the provisions of the Agricultural Marketing Agreement Act of 1937 the Secretary of Agriculture through the issuance of orders or the fostering of marketing agreements as thereby provided for, is *expressly empowered* to provide for the classification of milk in accordance with the form in which or the purpose for which it is to be used; provide for a method for *fixing minimum prices* which all handlers shall pay and the time when payments shall be made, such prices to be *uniform* as to *all handlers* subject only to adjustments provided for, and to provide for the payment of *uniform prices to producers*, and the conditions under which new producers may be accepted into or permitted to sell milk in a *given marketing area*.

(g) The Robinson-Patman Act approved June 19, 1936, made it unlawful to *discriminate in prices* and requires the charging of *uniform prices*.

The Government has failed to recite all of the acts referred to in the opinion of the Court. Furthermore, it is unnecessary to cite any authorities that these appellees are not limited to the grounds stated in the opinion of

, the District Court, or the order entered in pursuance thereof. These appellees are entitled to refer to any Acts of Congress, or decisions of courts, which sustain the theory of the District Court relative to the exemptions and exceptions made by Congress subsequent to the enactment of the Sherman Act which may directly or indirectly sustain the theory of the lower Court as expressed in its opinion and order.

We contend that the District Court was right in the interpretation of the purpose of the acts here referred to in that they provide for an *exception or exemption* as to farmers in relation to the production and marketing of their products, and *provide for supervision, regulation and control over such production and marketing of agricultural products in an orderly manner*; and that all of these laws passed subsequent to the Sherman Act, pointed the way to farmers whereby they might meet the *economic situation* with which they, as well as the public at large, were confronted.

The Capper-Volstead Act provides a *specific and particular procedure* to be observed by farmers in the production, sale and marketing of their products, and also provides the procedure that is to be taken by the Government through its officers and agents, in order to supervise, control and regulate the production and marketing of farm commodities, as well as the procedure to be taken by the Government to enforce the object and purpose of other Acts of Congress adopted subsequent to the Sherman Antitrust Law.

A proper construction of these laws shows the intention and purpose of Congress with respect to the production and marketing of farm commodities, and that these laws were passed for the purpose of making exceptions and exemptions, to provide a *special classi-*

*fication for producers of farm commodities* of all kinds, including milk, in order to promote, foster and encourage the intelligent and orderly marketing of agricultural products through cooperation, and thereby eliminate speculation and waste; and to stabilize the markets for agricultural products. This was to be accomplished through the incorporation and operation of agricultural cooperative associations and societies by expressly conferring power upon them to make and execute marketing contracts and agreements with their members as well as with the purchasers and buyers of their products, all of which contracts and agreements are necessary to successfully accomplish the objects and purposes of these organizations.

Congress therefore made an *exception* and recognized a *special class to include producers* of agricultural commodities following the enactment of the Sherman Act. During this period of legislative history, forty-seven states of the Union have adopted almost uniform laws for the purpose of carrying out this same general public policy. Courts can and should, therefore, liberally construe all of this legislation so that the purpose and intent of Congress and the legislatures of the several states will be carried out by recognizing and *protecting the class falling within the exceptions and exemptions thus provided for.*

It is *inconsistent* for Congress to have adopted a *general public policy* favoring, fostering and promoting the formation and operation of organizations intended to advance the interests of agricultural producers *without intending thereby to supersede all laws which, prior thereto, prohibited the formation and operation of such organizations.*

The contention that the Sherman Act as originally enacted failed to except agricultural cooperative associa-

tions or producers of farm products is a moot question so far as this case is concerned. This principle might have been good, if asserted in a similar case pending before the present century, or at least prior to the passage of the Clayton Act, and it makes no difference at all that while debate over the enactment of the Sherman Act was in progress an amendment was offered and rejected providing exemptions for persons engaged in agricultural pursuits. The point is that since that time new and far reaching laws, developments and trends in the economic thinking of the country have taken place. Agricultural cooperative associations among farmers have in the meantime become legalized and accepted as an essential, necessary and customary method and system within our agricultural economy.

Throughout the Nation in the legislatures of the separate states, as well as in Congress and many times by judicial decision, the organization and operation of such associations has been recognized as promoting the public welfare.

The Government cannot justify the position it now takes wherein it seeks to enforce a public policy and procedure of fifty years ago which, so far as its application, if any, to the farmer and the marketing of agricultural products is concerned, has been *superseded by a public policy* declared by Congress as a result from time to time of advanced thought, experience and exhaustive study of the economic problems arising since the passage of the Sherman Act, and the plight of the farmer as well as the public, which, in the judgment of Congress, required the declaration of a *new public policy and procedure* relating to the production, sale and marketing of farm commodities.

It is true that only a few members of Congress, at the time of the passage of the Sherman Anti-Trust Law, insisted that Congress make an *exception* as to farmers and

the marketing and production of farm commodities. We see no argument in the point because the majority of the Congress nearly fifty years ago was unable to see the necessity of such progressive laws as a matter of public policy, and rejected an amendment offered, the object and purpose of which was to make farmers exempt from the application of the Sherman Act in view of the fact that since that time such laws have been passed.

Recognizing these problems, the Legislature of the State of Illinois in adopting the Act under which Pure Milk Association is incorporated declared the public policy of this state to be:

"In order to promote, foster and encourage the intelligent and orderly marketing of agricultural products through co-operation; to eliminate speculation and waste; to make the distribution of agricultural products between producer and consumer as direct as can be efficiently done; to stabilize the marketing of agricultural products, and to provide for the organization and incorporation of agricultural co-operative associations and societies; this Act is passed." (Ill. Rev. Stat. 1939, Chap. 32, Sec. 440.)

This Legislature at the same time likewise provided:

"No association as defined in this Act engaged in any of the activities herein, shall be deemed to be a conspiracy or combination in unlawful restraint of trade or an illegal monopoly; or an attempt to lessen competition or to fix prices arbitrarily, nor shall the marketing contracts and agreements between the association and its members or any agreements authorized in this Act be considered illegal as such or in unlawful restraint of trade or as part of a conspiracy or combination to accomplish an improper or illegal purpose." (Ill. Rev. Stat. 1939, Chap. 32, Sec. 468.)

In adopting the Agricultural Marketing Act approved June 15, 1929, Congress declared:

"(a) It is hereby declared to be the policy of Congress to promote the effective merchandising of agricultural commodities in interstate and foreign com-

merce, so that the industry of agriculture will be placed on a basis of economic equality with other industries, and to that end to protect, control, and stabilize the currents of interstate and foreign commerce in the marketing of agricultural commodities and their food products—

- (1) by minimizing speculation.
  - (2) by preventing inefficient and wasteful methods of distribution.
  - (3) by encouraging the organization of producers into effective associations or corporations under their own control for greater unity of effort in marketing and by promoting the establishment and financing of a farm marketing system of producer-owned and producer-controlled cooperative associations and other agencies.
  - (4) by aiding in preventing and controlling surpluses in any agricultural commodity, through orderly production and distribution, so as to maintain advantageous domestic markets and prevent such surpluses from causing undue and excessive fluctuations or depressions in prices for the commodity."
- (46 Stat. 11, 12 U. S. C. A. 1141.)

This court in the case of *Liberty Warehouse Co. v. Burley Tobacco Growers' Co-op. Marketing Ass'n.*, 276 U. S. 71, in construing the Bingham Cooperative Marketing Act of Kentucky, said at page 92: . . .

"It is stated without contradiction that cooperative marketing statutes substantially like the one under review have been enacted by 42 states. Congress has recognized the utility of co-operative association among farmers in the Clayton Act (38 Stat. 731, (15 U. S. C. A. 17), the Capper-Volstead Act (42 Stat. 388, 7 U. S. C. A. Secs. 291-292)) and the Cooperative Marketing Act of 1926 (44 Stat. 802, 7 U. S. C. A. Sec. 451-457). These statutes reveal widespread legislative approval of the plan for protecting scattered producers and advancing the public interest. Although frequently challenged, we do not find that any court has condemned an essential feature of the plan with the single exception of the Supreme Court of Minnesota."

This court then discussed at length the following cases:

*Warren v. Alabama Farm Bureau Cotton Assn.*,  
213 Ala. 61, 104 So. 264.

*Arkansas Cotton Growers' Co-op. Ass'n. v. Brown*,  
168 Ark. 504, 270 S. W. 946.

*Manchester Dairy System, Inc., v. Hayward*, 132  
Atl. 12.

*Tobacco Growers' Co-op. Ass'n. v. Jones*, 185 N. C.  
265, 117 S. E. 174.

*Northern Wisconsin Co-operative Tobacco Pool v.  
Bekkedal*, 182 Wis. 571, 197 N. W. 936.

*Dark Tobacco Growers' Co-op. Ass'n. v. Dunn*, 150  
Tenn. 614, 266 S. W. 308.

After an extensive review of the opinions rendered in the above cases, this Court, at page 96, said:

"The opinion generally accepted—and upon reasonable grounds, we think—is that the co-operative marketing statutes *promote the common interest*. The provisions for protecting the fundamental contracts against interference by outsiders are *essential* to the plan. This court has recognized as permissible some *discrimination intended to encourage agriculture*. *American Sugar Refining Co. v. Louisiana*, 179 U. S. 89, 95, 21 S. Ct. 43, 45 L. Ed. 102; *Cox v. Texas*, 202 U. S. 446, 26 S. Ct. 671, 50 L. Ed. 1099. And in many cases it has affirmed the general power of the states, so to legislate as to *meet a definitely threatened evil*: *International Harvester Co. v. Missouri*, 234 U. S. 199, 34 S. Ct. 859, 58 L. Ed. 1276, 52 L. R. A. (N. S.) 525; *Jones v. Union Guano Co.*, 264 U. S. 171, 44 S. Ct. 280, 68 L. Ed. 623. Viewing all the circumstances, it is impossible for us to say that the Legislature of Kentucky could not treat marketing contracts between the association and its members as of a separate class, provide against probable interference therewith, and to that extent limit the sometime action of warehousemen."

In the case of *Potter v. Dark Tobacco Growers' Co-opera-*

tive Association (1923), 201 Ky. 441, 257 S. W. 33, the Court said at page 35:

"Indeed, since the Clayton Amendment of the Sherman Act (U. S. Comp. St. § 8835f) *expressly exempts* agricultural and horticultural organizations *instituted* for the purpose of mutual help, and not having capital stock or conducted for profit *from anti-trust provisions*, it recognizes as reasonable a classification based upon such pursuits. Hence the *Sherman Act as amended* is itself expressive of a change in the public attitude and *policy toward agricultural* and horticultural pursuits in relation to other business activities, and a recognition of a *necessity for the public welfare* of permitting organization among such citizens to enable them to meet justly and without undue advantage the conditions they encounter in necessary trade relations with other citizens, or rather groups.

"Nor are the *Clayton Act and the many other recent acts of Congress treating farmers as a distinct class* the only expressions of such a change in public opinion and the public policy of our nation with reference to them and their economic problems. The enactment by the Legislatures of 30 or more of the states of enabling acts precisely like the Bingham Co-operative Marketing Act is further evidence of the present state of public opinion on the matter, as is the attitude of every other agency through which an enlightened public policy may be declared, including the *most recent resume of the state of the Union by the President of the United States*.

"The basis of this change in public opinion toward combination and classification is not in any sense political, but *economic rather*, and, in our judgment, it is because of basic economic conditions, affecting vitally not only the farmers, but also the public weal, that the classification based upon *agricultural pursuits* is reasonable, just, and imperative for the good of the entire nation and every citizen thereof." (Italics ours.)

The reasoning of the Supreme Court of the State of Kentucky as far back as 1923 seems almost prophetical in view of the laws that have been passed by Congress since that time. Such laws recognize the economic situation relating to farmers as affecting the entire nation. It cannot be

doubted that such laws were clearly intended to declare the *public policy* of the United States for the advancement of the *public welfare*.

We call attention to the opinion of Attorney General William D. Mitchell, rendered to the President of the United States on April 11, 1930 (Vol. 36, p. 326 of the Opinions of the Attorneys General) wherein he informed the President that under the Capper-Volstead Act, farmer producers, acting together by and through cooperative associations that qualify thereunder, were exempt "from prosecution under said Federal anti-trust laws." The Attorney General said in his opinion at page 333:

"Section 1 of the Capper-Volstead Act relates to producers acting together in associations, corporate or otherwise, 'in collectively processing, preparing for market, handling, and marketing in interstate and foreign commerce, such products of persons so engaged.' That marketing in 'interstate and foreign commerce' is an essential feature of associations which may be regarded as qualified under the Capper-Volstead Act is manifest not only from its language but from the purpose of that Act. Its object was primarily to insure cooperative associations that qualified thereunder immunity from prosecution under the Federal anti-trust laws. Those laws apply only to persons engaged in interstate and foreign commerce. There would have been no reason for the enactment of a Federal law to protect persons engaged in the production of agricultural products and dealing solely in intrastate commerce from the operation of the anti-trust laws. Section 2 of the Capper-Volstead Act provides for proceedings by the Secretary of Agriculture against the associations described in Section 1 if he 'shall have reason to believe that any such association monopolizes or restrains trade in interstate or foreign commerce to such an extent that the price of any agricultural product is unduly enhanced by reason thereof' and for the enforcement of orders made by the Secretary pursuant to such proceeding. The entire Act thus relates to the activities of such associations in interstate and foreign commerce." (Italics ours.)

A review of the legislation and decisions previously referred to will reveal that *Congress has from time to time modified, changed and superseded the procedure originally intended under the Sherman Act.*

It was held in the case of *United States v. Trans-Missouri Freight Assn.*, 166 U. S. 290, 340, that the public policy of a state is what the Legislature declares it to be, and that provisions in a contract whereby a purchaser agrees to purchase the entire supply of an agricultural commodity from the producer does not make the contract in restraint of trade. See also *Twin City Pipe Line v. Harding Glass Company*, 283 U. S. 353. It is evident, therefore, that the *public policy of a State* is what the Legislature declares it to be, and the *public policy of the United States* is what Congress declares it to be. *These matters of public policy and procedure established by these subsequent acts cannot be set aside by applying Section 1 of the Sherman Act, passed nearly fifty years ago.*

*Such construction would destroy the public policy announced by the Legislatures of the various states and approved by Congress, as expressed by the later legislation changing the public policy of the Government toward agriculture and those engaged in the production of farm commodities. Congress intended to encourage, favor, foster and promote the formation, organization and operation of farm cooperative associations in the interest of producers in order to improve the economic status of agriculture for the promotion of the public welfare.*

Some light reasoning is indulged in by the Government at page 59 of its brief to the effect that Section 6 of the Clayton Act of 1914 did not confer upon labor organizations a blanket exemption from the prohibitions of the Sherman Act. Citing *Loewe v. Lawlor, supra*, *Duplex Company v. Deering, supra*, and *Bedford Company v. Stone Cutters' Association*, 274 U. S.

37. The Government would have this Court apply the decisions in those cases which concerned labor organizations involved in a boycott, to farmers and their associations such as the appellee, Pure Milk Association. *The application of these cases to the one at bar cannot be made legitimately.* Congress has recognized the essential distinguishing features between these two classes, labor and agriculture, and has already enacted separate legislation applicable to these respective classes. In addition to what we have already said regarding the long line of cases discussed in Part II, *supra*, it is worthy of note that these three latter cases were civil suits instituted either for the collection of damages from a labor union and its members, or for an injunction to restrain them from committing or continuing an alleged unlawful activity. A criminal prosecution by indictment under Section 1 of the Sherman Act is not involved in these three cases. They merely decide that a secondary boycott by a labor union in the manner in which such was conducted does not come within the immunity conferred by Section 6 of the Clayton Act as applied to labor. In determining that the acts of the union did not come within the *rule of reason*, this Court concluded:

"Tested by these principles, the propriety of the unions' conduct can hardly be doubted by one who believes in the organization of labor. Neither the individual stone cutters nor the unions had any contract with any of the plaintiffs or with any of their customers." *Bedford Company v. Stone Cutters' Assn.*, 274 U. S. 37, at p. 58.

The unions in question were apparently not operating under any agreement or contract with the parties against whom they were seeking to enforce a secondary boycott. Applying this principle to the question at issue, the record clearly discloses that the appellee, Pure Milk Association, did have agreements with all of its members (R. 8) and

contracts of sale with the buyers to which it sold the products of its members (R. 12).

We note in the Government's brief (p. 63), the contention that although the Interstate Commerce Act embodies a remedial system that is complete and self-contained, yet the Sherman Act in certain cited cases was held to apply notwithstanding the Commission's jurisdiction. The cases cited are the following:

*United States v. Pacific & Arctic Railway Co.*, 228 U. S. 87, decided in April, 1913;

*United States v. Union Pacific R. R. Co.*, 226 U. S. 61, decided in 1912;

*United States v. Joint Traffic Association*, 171 U. S. 505, decided in 1898, and

*United States v. Trans-Missouri Freight Assn.*, 166 U. S. 290, decided in 1897.

A reading of the last three mentioned cases discloses that the only act involved was the Sherman Anti-Trust Act. This Court did not decide in any of those cases that the Sherman Act and the Interstate Commerce Act were independent of one another. Therefore, the Government's statement is not based upon an accurate conception of these three decisions. The only one of the afore cited cases in which both the Sherman Act and the Interstate Commerce Act are discussed is that of *United States v. Pacific & Arctic Railway Company*, *supra*. However, before considering that case, it is important to point out that all of these cases cited on the theory that the Sherman Act prevails notwithstanding the jurisdiction of regulatory boards, were decided prior to the vesting by Congress of jurisdiction in the Interstate Commerce Commission of certain provisions of the Clayton Act of 1914, i. e., sections 2, 3, 7 and 8 of the Clayton Act (38 Stat. 730, 731, 732). Furthermore, all of

these cases were decided prior to the enactment in 1916 of the Federal Shipping Act.

The *Pacific & Arctic* case, *supra*, involved a ruling of the lower court dismissing all counts of an indictment on demurrer thereto. Counts III, IV and V of the indictment which alleged violations of the Interstate Commerce Act were dismissed by the lower court on the ground that the proper forum in the first instance was the Interstate Commerce Commission, and not the Court. This ruling was affirmed by the United States Supreme Court. Counts I and II of the indictment were dismissed by the lower court for the same reason. This Court, however, reversed this part of the judgment on the ground that Counts I and II properly charged an offense under the Sherman Act, stating that the gist of those counts was monopolization.

It is all important, however, to bear in mind that when this case was decided in 1913, the Clayton Act of 1914 had not yet been enacted into law. Under Section 3 of the Clayton Act authority is vested in the Interstate Commerce Commission to proceed against a railroad corporation which is alleged to violate the prohibitions of said section. One of the enumerated prohibitions therein contained is that of monopoly. Consequently, it might well be that had the *Pacific & Arctic* case, *supra*, come before this Court subsequent to the passage of the Clayton Act of 1914, rather than before its passage, this Court would have sustained the lower court's ruling on Counts I and II as it did with respect to Counts III, IV and V for the reason that the proper forum was the Interstate Commerce Commission and not the court.

In view of this analysis of the *Pacific & Arctic* case, *supra*, we assert that it is not an authority for the position here taken by the Government, but rather is an authority directly supporting the contention of these appellees, Pure Milk As-

sociation, its officers and agents, that the proper forum in this case in the first instance is the Secretary of Agriculture, subject to review by the Federal Courts under Section 2 of the Capper-Volstead Act, and not by way of indictment under Section 1 of the Sherman Act.

In passing we note that some courts have regarded the *Traffic Association* cases, *supra*, as having been repudiated by subsequent decisions of this Court. See *List v. Burley Tobacco Growers' Co-op. Ass'n.*, 114 Ohio St. 361; 151 N. E. 471, 474.

Thus we reiterate what we said in Part II, *supra*, that by direct analogy to the authority of the Interstate Commerce Commission and the United States Shipping Board, plenary and exclusive jurisdiction was vested in the Secretary of Agriculture by Section 2 of the Capper-Volstead Act to proceed against an agricultural cooperative association such as the appellee, Pure Milk Association, in light of the charges in the indictment in this case as interpreted by the District Court.

The power of prosecution by the Department of Justice is not inherent in that Department. This power is limited to exercising punitive measures under Acts of Congress creating the crimes, misdemeanors and forms of irregularity or misconduct to which such punitive measures are provided to apply. The course to be pursued by the Government in its efforts to enforce observance of its laws controlling the activities of persons in any of the varied relations where individual rights or the public welfare are involved, is determined by the Acts of Congress with respect thereto. Questions arising in interstate commerce or the law in relation thereto are no exemption. It is so commonly known that this Court may well take judicial notice of the fact that no agricultural cooperative associations or marketing agencies recognized solely as such by

the law of any state, or by the United States, existed at the time the Sherman Act was enacted. Such associations did not become the creatures of any special statute, state or national, until many years following the passage of the Sherman Anti-Trust Act. After such associations came into existence by virtue of the Acts of the Legislatures of the various states, consideration was given by Congress for devising appropriate measures for regulating their conduct in interstate commerce.

*The settled legislative policy of treating associations of agricultural producers differently from ordinary business corporations rests upon a reasonable basis of classification approved by the courts.* Statutes fostering the development and growth of cooperative associations of producers for marketing farm products have been enacted primarily since the early 1920's in all but one of the states.\*

With two early exceptions, wherever the question has been raised that such statutes enacted by state legislatures violate the Fourteenth Amendment of the Federal Constitution, courts of last resort have held the statutes to be constitutional. *Thus, there has been judicial sanction of the special privileges or advantages conferred by such statutes upon farmers' cooperative associations.*

One of these decisions which commends itself to quotation is that of *List v. The Burley Tobacco Growers' Association*, 114 Ohio St. 361, 151 N. E. 471, decided in 1926. Therein the Supreme Court of Ohio in passing on the question of reasonableness of classification upon which the Cooperative Marketing Act was based, stated (p. 480):

"In determining whether co-operative associations organized for the purpose of marketing agricultural products are such a favored class as to be within the

\* See statutes cited in footnote 11 to the dissenting opinion of Mr. Justice Brandeis in *Frost v. Corporation Commission*, 278 U. S. 515, 540 and in footnote 14 to that opinion (pp. 541-542).

inhibitions of the fourteenth amendment, we must look to the fact that persons engaged in agriculture are widely scattered and compose so numerous a class that it is a physical and economic impossibility to combine them all in any commercial enterprise, and we should further look to the fact that many of them are very small producers of such limited means that they must market their products immediately after harvesting, and are therefore at the mercy of purchasers, without any voice whatever in making prices or terms. It must be recognized on the other hand that merchants and manufacturers dealing in any single line of agricultural products are comparatively few and congregated in definite localities. \* \* \* Such different situations and conditions were evidently considered by the Legislatures of the different states and by Congress, whose duty and province it is to consider the economic problems involved. Such legislative acts should not be held to be invalid and unconstitutional, unless clearly violative of the constitutional inhibition.

"In the last analysis this controversy turns upon a question of public policy. The earlier anti-trust legislation is being modified and certain well-defined exemptions are being created. The earlier decisions of the courts construing those acts strictly are being modified and overturned by later decisions. \* \* \* Co-operative marketing acts have been passed by more than three-fourths of the states of the Union. These enactments have been upheld by the courts of last resort of 15 states of the Union, and, up to this time (1926), in not a single case have any of such state laws been declared invalid. \* \* \*"

To like effect see the following:

*Tobacco Growers Co-op. Asso. v. Jones*, 185 N. C. 265  
*117 S. E. 174; Kansas Wheat Growers v. Schulte*, 113 Kan.  
*672, 216 P. 311; Brown v. Staple Cotton Growers Co-op.*  
*Asso.*, 132 Miss. 859, 96 So. 649; *Northern Wisconsin Co-op.*  
*Tobacco Pool v. Bekkedal*, 182 Wis. 571, 197 N. W. 936;  
*Dark Tobacco Growers Co-op. Asso. v. Dunn*, 150 Tenn.  
*612, 266 S. W. 308; Minnesota Wheat Growers Co-op.*  
*Marketing Asso. v. Huggins*, 162 Minn. 471, 203 N. W. 420;

*List v. Burley Tobacco Growers Co-op. Assn.*, 114 Ohio St. 361, 151 N. E. 491; *Dark Tobacco Growers Co-op. Asso. v. Robertson*, 84 Ind. App. 51, 150 N. W. 106; *Porter v. Dark Tobacco Growers Co-op.*, 201 Ky. 441, 257 S. W. 33; *Harrell v. Cane Growers Co-op.*, 160 Ga. 30, 126 S. E. 531; *Nebraska Wheat Growers v. Norquist*, 113 Nebr. 731, 204 N. W. 798; *Warren v. Alabama Farm Bureau Cotton Asso.*, 213 Ala. 61, 104 So. 264; *Manchester Dairy System v. Hayward*, 83 New Hamp. 193, 132 Atl. 12; *Clear Lake Co-op. Livestock Asso. v. Weir*, 200 Iowa 1293, 206 N. W. 297; *Hollingsworth v. Texas Hay Asso.*, (Tex. Civ. App. 1922), 246 S. W. 1068; *Washington Cranberry Asso. v. Moore*, 117 Wash. 430, 201 P. 773; *Poultry Producers v. Barlow*, 189 Cal. 278, 208 P. 193; *Oregon Growers Co-op. Assn. v. Lentz*, 107 Ore. 561, 212 P. 811; *South Carolina Cotton Growers v. English*, 135 S. C. 9, 133 S. E. 542; *Milk Producers' Marketing Co. v. Bell*, 234 Ill. App. 222; *Barns v. Dairymen's League Co-op. Asso. Inc.*, 220 App. Div., 624, 222 N. Y. Supp. 294; *Stark County Milk Producers Asso. v. Tabeling, etc.*, 129 Ohio St. 159, 194 N. E. 16.

This Court has in turn had occasion to pass upon the Kentucky Cooperative Marketing Statute involved in the *List* case *supra*. The case to which reference is made is that of *Liberty Warehouse Company v. Burley Tobacco Growers' Cooperative Marketing Association*, 276 U. S. 71, 48 S. Ct. 291, decided in 1928, from which case we have quoted *supra*, pp. 34-35. In addition, this Court quoted with approval from the opinion of the court below (pp. 94, 95):

"We take judicial knowledge of the history of the country and of current events, and from that source we know that conditions at the time of the enactment of the Bingham Act were such that the agricultural producer was at the mercy of speculators and others who fixed the price of the selling producer and \* \* \* the final consumer through combinations and other ar-

rangements, whether valid or invalid, and that by reason thereof the former obtained a grossly inadequate price for his products. So much so was that the case that the intermediate handlers between the producer and the final consumer injuriously operated upon both classes and fattened and flourished at their expense. It was and is also a well-known fact that, without the agricultural producer, society could not exist, and the oppression brought about in the manner indicated was driving him from his farm, thereby creating a condition fully justifying an exception in his case from any provision of the common law, and likewise justifying legislative action in the exercise of its police power.'

In *Arkansas Cotton Growers Co-op. Assn. v. Brown* (1925), 168 Ark. 504, the Court sustained a Co-operative Marketing Act—

'The statute seems to be in a form which has become standard, and has been enacted in many of the states, the enactment of such legislation being manifestly prompted by the universal urge to promote prosperity in agricultural pursuits. There has been much discussion of the plan in the decisions of the courts of the various states where it has been adopted, and the general view expressed is that the statute should be liberally construed in order to carry out the design in its broadest scope.'

*Tobacco Growers' Co-op. Assn. v. Jones*, 185 N. C. 265—

'In view of the necessity of protecting those engaged in raising tobacco against the combination of those who buy the raw product at their own figures and sell it to the public at prices also fixed by themselves, this movement has been organized. By a careful examination of all the provisions of the act under which the association is acting, it will be seen that every precaution has been taken to insure that it will not be used for private gain, and can operate only for the protection of the producers.'

*Northern Wisconsin Co-operative Tobacco Pool v. Bekkedal*, 182 Wis. 571—

'The reasons for promoting such legislation are generally understood. It sprang from a general, if not

well-nigh universal belief that the present system of marketing is expensive and wasteful, and results in an unconscionable spread between what is paid the producer and that charged the consumer. It was for the purpose of encouraging efforts to bring about more direct marketing methods, thus benefiting both producer and consumer, and thereby promoting the general interest and the public welfare, that the legislation was enacted.

(pp. 96, 97, id.) :

*'The opinion generally accepted—and upon reasonable grounds, we think—is that the co-operative marketing statutes promote the common interest. . . . This court has recognized as permissible some discrimination intended to encourage agriculture. American Sugar Refining Co. v. Louisiana, 179 U. S. 89, 95. Cox v. Texas, 202 U. S. 446. And in many cases it has affirmed the general power of the States, so to legislate as to meet a definitely threatened evil. International Harvester Co. v. Missouri, 234 U. S. 199; Jones v. Union Guano Co., 264 U. S. 171. Viewing all the circumstances, it is impossible for us to say that the legislature of Kentucky could not treat marketing contracts between the Association and its members as of a separate class, provide against probable interference therewith, and to that extent limit the sometime action of warehousemen.'*

*'The question is whether the restrictions of the statute have reasonable relation to a proper purpose. Miller v. Wilson, 236 U. S. 373, 380 . . . . (Italics supplied.)'*

See also *American Sugar Refining Co. v. Louisiana*, 179 U. S. 89, 21 S. Ct. 43, 45 L. Ed. 102; *International Harvester Company v. Missouri*, 234 U. S. 199, 34 S. Ct. 859; *Aero, etc. Transit Company v. Georgia Public Service Commission*, 295 U. S. 285, 289-291.

The cases cited and quoted from *supra* pertaining specifically to co-operative marketing acts, demonstrate that any specialized treatment accorded farmers when acting together in associations, is based upon a reasonable class-

*ification not offensive to the Fourteenth Amendment of the Federal Constitution.* These cases further establish that both by Federal and State statute and by the judicial interpretation of them that public policy is strongly in favor of agricultural cooperation. They and many decisions of this court cited *supra* conclusively indicate that the Fourteenth Amendment of the Federal Constitution has not deprived states of their power of classification in legislation and to make differences of regulation where substantial differences of conditions exist. They establish that a classification is not invalid because of simple inequality. They have been uniformly sustained as not arbitrary and capricious by the courts of last resort including the decision of this court in the *Liberty Warehouse case, supra*.

Thus far, we have been discussing State co-operative marketing statutes in their relation to the Fourteenth Amendment of the Federal Constitution. From a federal legislation standpoint, long prior to the decision in the *Liberty Warehouse case, supra*, Congress itself recognized the utility of cooperative association among farmers.

In 1914 the Clayton Act (38 Stat. 730, 15 U. S. C., Sec. 17) was enacted in which non-stock, non-profit agricultural organizations were excepted from the operation of the anti-trust laws.

The War Finance Corporation Act of April 5, 1918 (40 Stat. 512, 15 U. S. C., Sec. 348) authorized advances to cooperative associations of producers whenever they had made advances for agricultural purposes or discounted commercial paper for such purposes.

The Grain Futures Act (42 Stat. 998, 7 U. S. C., Sec. 17 (e)) extended privileges to cooperative associations not accorded to other business enterprises. These provisions were retained in the amendment and reenactment of the

law in 1936 as the Commodity Exchange Act (49 Stat. 1491, 7 U. S. C.—Supp. IV, Sections 7 (e), 10 (a)).

There followed in 1922 the Capper-Volstead Act here in question (42 Stat. 388, 7 U. S. C., Sections 291, 292).

Under the McKinley Tariff Act of 1926 (44 Stat. 91, 26 U. S. C., Sec. 75L (b)) cooperative associations were exempted from registration.

Since the *Liberty Warehouse* decision Congress has been prolific in furthering this policy of aiding and encouraging the establishment and operation of cooperatives and likewise in these later enactments has dealt differently with such cooperatives in contradistinction to proprietary enterprises.

The Agricultural Marketing Act passed in June 1929 (46 Stat. 18, 12 U. S. C., Sections 1141, 1141 (J)), expressed a congressional policy to promote merchandising of agricultural commodities in such a way as to put agriculture on a basis of economic equality with other industries.

Loans to cooperatives were expressly authorized by an act passed June 15, 1929 (46 Stat. 14, 12 U. S. C., Sec. 1141 (e)), authorized the Governor of the Farm Credit Administration to organize a "Central Bank for Cooperatives" and 12 banks to be known as "banks for cooperatives" to make loans to cooperative associations.

The Robinson-Patman Act of June, 1936 (49 Stat. 1528, 15 U. S. C., Supp. IV, Section 13 (a)) exempts a cooperative association from any requirement of the act which would prevent the association from returning to its members "the whole or any part of its net earnings or surplus resulting from its trading operations in proportion to their purchases from, to, or through the association."

The Agricultural Marketing Agreement Act of 1937 (50

Stat. 246, 7 U. S. C., Sec. 601, *et. seq.*) is shot through with cooperative marketing recognition.

Agricultural associations have been exempted from payment of federal income taxes on corporations since 1913 (38 Stat. 172), and the 1934, 1936 and 1938 income tax laws (48 Stat. 700; 49 Stat. 1673; 52 Stat. 480; 26 U. S. C., Sec. 103 (12)) have continued this exemption.

Under these last mentioned revenue acts, provisions exempting "Agricultural Associations" were sustained in *Flint v. Stone Tracy Company*, 220 U. S. 107, 173 and in *Brushaber v. Union Pacific Railroad Co.*, 240 U. S. 1, 21.

The *Grain Futures Act, supra*, was sustained in *Chicago Board of Trade v. Olsen*, 262 U. S. 1, in the face of the contention that certain of its provisions were for the benefit only of farmers organizations. See also the case of *In Re Marketing Association of Fort Wayne, Inc.*, 8 F. (2d) 626, wherein it was held that a dairy cooperative association is not a "monitored business or commercial corporation" within the meaning of the Federal Bankruptcy Act.

Consequently, if said statutes which have authorized the association of agricultural producers for the purpose of collectively marketing their produce and have further exempted their contracts and agreements, as well as their status, from the prohibitions of said anti-trust statutes, do not offend against the Fourteenth Amendment, then, *a fortiori*, Capper-Volstead Act does not offend against the Fifth Amendment to the Federal Constitution. This is necessarily true because the Fifth Amendment unlike the Fourteenth Amendment has no equal protection clause, and legislation by Congress subject to "restraints less narrow and confining" than is legislation of the several states. *Curran v. Wallace*, No. 275, decided January 30, 1939, 59 S. Ct. 379. See also *Quong Wing v. Kirkendall*.

223 U. S. 59, 62; *LaBelle Iron Works v. United States*, 256 U. S. 377; *Brushaber v. Union Pacific R. Co.*, 240 U. S. 1.

More recently this Court has had occasion to pass upon the constitutional validity of the Agricultural Marketing Agreement Act of 1937 (50 Stat. 246, 7 U. S. C. A., Section 601, *et. seq.*), in the case of *United States v. Rock Royal Co-op., Inc., et al.*, Nos. 771, 826-828, decided June 5, 1939, 159 S. Ct. 993, and in that case the provisions of the statute which excepted cooperative associations acting as handlers from the payment of the uniform price which all other handlers were required to pay was held not violative of the Fifth Amendment on the ground that it was not an arbitrary and unreasonable classification. See also *Stewart Machine Company v. Davis*, 301 U. S. 548, 584.

In view of the foregoing, and in light of our interpretation of the scope and intention of the Capper-Volstead Act, we submit that Congress may accord farmers and their cooperative associations treatment different from that given proprietary business concerns, and that such a law, while classification legislation, is founded upon a reasonable basis and being a special statute takes precedence over the general law, Section 1 of the Sherman Anti-Trust Act.

Congress fully understood when it passed the Capper-Volstead Act and the other acts referred to, that it provided an adequate remedy for the protection of the public in case any cooperative association should attempt to unlawfully restrain trade. Section 2 of the Capper-Volstead Act does not preclude action being taken by the Department of Justice and either the Government or the producer, if dissatisfied with the findings in a desist order of the Secretary of Agriculture, may have the record and proceedings certified to a District Court and a decree entered therein, either affirming, modifying or setting aside

said order, or may enter such other decree as the court may deem equitable. After the case has reached such a stage, the Department of Justice shall have charge of the enforcement of such an order and "the court may upon conclusion of its hearing enforce its decree by permanent injunction, or other appropriate remedy."

It will thus be seen that a District Court may enforce its decree by any appropriate remedy. Such proceedings would be much more effective than a proceeding such as is now pending upon indictment. Congress well knew when it adopted the Capper-Volstead Act and the subsequent acts that the inherent right of a court to enforce its decree means that the court can, if its orders are not obeyed, punish the violator for contempt of court, or enter such other order as would be effective in enforcing its decree. Congress saw fit to place the regulation and correction of agricultural cooperatives in the hands of the Secretary of Agriculture, and there being nothing contained in the Act to the contrary, it must be presumed that the jurisdiction so given to the Secretary of Agriculture is in the first instance exclusive and intended as a clear and distinct exception and a limitation upon the right of the Department of Justice as is clearly intended by the terms of Section 2 of said Act. The exception was made for an economic reason. Agriculture is an enterprise distinct and different from every other form of business activity. The structure of an agricultural association is different from that of a business corporation for profit. The purpose of these cooperatives is to encourage and foster the production of the things that are necessary to human existence. Many elements are involved, among which are the nature of the occupation itself, the problems to which it is subjected by the uncertainties of season, weather and marketing conditions and the usually un-

certain and slender margin of profit derived by those who engage in the business of the production of milk, under all the rules of supervision with respect to health of live stock, sanitation of surroundings and equipment.

The problem of the average dairyman or farmer milk producer, in addition to the manifold uncertainties of supply and demand, embrace not only all the hazards peculiar to the pursuit of farming, but in addition thereto, certain inherent exigencies affecting this particular calling. Among these are the requirements for general equipment, consisting of a place or location stocked with good producing cows and general equipment necessary to the healthy production of fluid milk. If dairying is to become his central object, the extent and nature of his investment in that line usually compels him to forego other extensive farming activities. The fact that he has centered upon dairying, however well and carefully equipped, does not in itself provide any assurance of success. His problems are of a continuing nature and, although by careful management, he may be able to produce abundantly, the uncertainties of a fair or profitable market for his product are a constant and menacing anxiety.

We further call attention to the fact that the provisions of Section 2 of the Capper-Volstead Act imposing upon the Secretary of Agriculture the duty of apprehending any violation by any Agricultural Cooperative Association of the laws pertaining to monopolies or restraints upon trade in interstate or foreign commerce, is a reasonable exercise of the police power, and was and is intended to be sufficient for the purpose of investigating, apprehending, regulating, correcting and administering disciplinarian deterrents sufficient to the purpose of discouraging such violation.

Since considerable time is devoted by the Government to a discussion of the legislative history of the Capper-

Volstead Act (*Brief for the United States*, pp. 64-67), it must regard that act as reasonably susceptible of the interpretation placed upon it in this Brief. This Court has frequently indicated that it will not, in construing a statute, consider its legislative history where its meaning is plain and unambiguous. See, for example, *Helvering v. City Bank Farmers' Trust Co.*, 296 U. S. 85. Since the meaning of the Capper-Volstead Act is plainly that attributed to it, *supra*, the legislative history of the statute would not have been here considered had the Government not seen fit to discuss it. The legislative history of the law, however, leads inevitably to conclusions identical to those already reached in this Brief. In order that the discussion which follows may proceed with clarity, it will be profitable to outline at the outset the background of the Capper-Volstead Act.

The first bill concerning farm cooperatives to be introduced in the Congress was known as the Capper-Hersman Bill, and was introduced in the House of Representatives by Mr. Hersman on July 24, 1919, as H. R. 7783 (66th Cong., 1st Sess.). Although hearings on this bill were had before the House Committee on the Judiciary, it does not appear that any Committee report was made thereon, and no definite action was ever taken with respect to the bill.

The following year, another bill concerning agricultural associations, differing from the Capper-Volstead Act only in aspects not now material, was introduced in the House of Representatives as H. R. 13931 (66th Cong., 2d Sess., 1920). This bill was passed by the House, substantially in its original form (59 Cong. Rec., Part 8, p. 8041). It was also passed by the Senate, but only after being amended in a manner very material to this discussion (60 Cong. Rec., Part 1, p. 377). The Senate amendments to H. R. 13931, subsequently to be discussed, were not acceptable to the House of Representatives, and so the bill never be-

came law (60 Cong. Rec., Part 1, p. 571). It should here be noted that at the time when H. R. 13931 was pending, a bill containing provisions virtually identical to those of H. R. 13931 was pending in the Senate. This bill was known as S. 4344 (66th Cong., 2d Sess.). Although there were hearings on S. 4344 before the Subcommittee of the Senate Committee on the Judiciary, it was never reported out of Committee, very probably because of its similarity to H. R. 13931.

Undaunted by their previous failures, the proponents of legislation relative to agricultural associations introduced in the 67th Congress the bill which finally became the Capper-Volstead Act. The bill was known as H. R. 2373 (67th Cong., 1st Sess.). As stated in the Brief of the Government, the bill was enacted into law substantially in the form introduced in the House of Representatives.

From the foregoing summary of the background of the Capper-Volstead Act, it is apparent that insofar as the legislative history of H. R. 2373 may be pertinent to a construction of the Act, so also is the legislative history of H. R. 13931 and S. 4344.

The debates in the Senate concerning H. R. 2373 indicate very clearly that those who participated most actively believed that agricultural cooperatives were thereby intended to be excepted and rendered free from prosecutions under the Sherman Act. In order that the full import of these debates may be clearly understood, the amendment to the House bill proposed by the Senate Committee on the Judiciary and discussed extensively by the Senate is set forth in full in the margin.<sup>1</sup> Pertinent excerpts from the Senate debates follow:

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<sup>1</sup> "Nothing herein contained shall be deemed to authorize the creation of, or attempt to create, a monopoly, or to exempt any association organized hereunder from any proceedings instituted under the act entitled 'An Act to create a Federal Trade Commission, to define its powers and duties, and for other purposes,' approved September 26, 1914, on account of unfair methods of competition in commerce."

Mr. Kellogg [referring to the House version of H. R. 2373]: \* \* \* It may be said, therefore, that before such associations can be prosecuted under the Sherman Act for any restraint of trade or monopoly, whether it is a mere technical monopoly or not, the Secretary of Agriculture must investigate and make a finding that the cooperative association is in restraint of trade or is a monopoly and is unduly enhancing prices. \* \* \*

Mr. King: It is intended, then, as I understand the Senator, to make all such organizations absolutely immune from criminal prosecution.

Mr. Kellogg: *They are immune from criminal prosecution, and I think they ought to be.* I have never known much to be accomplished by criminal prosecution under the Sherman Act; if anything, very little.

Mr. King: *It denies the right of the Attorney General to initiate proceedings, even though he should believe from uncontrollable evidence that a monopoly stupendous in character and oppressive in results exists by reason of combinations of the character contemplated.*

Mr. Kellogg: The Senator understands from the statement I made that the Attorney General can prosecute suits instituted by the Secretary of Agriculture.<sup>2</sup>

Mr. Fletcher: \* \* \* I am cordially in full sympathy with the ideas and the plans which are back of this bill. I do not agree that it is necessary to amend the bill as proposed by the committee in order to avoid the establishment of a monopoly and *I think it is advisable to place these associations or organizations outside the provisions of the Sherman antitrust law.*

Mr. Walsh (of Montana): \* \* \* So that the sole matter of difference—in substance, *the sole question for determination—is the question as to whether we shall authorize the setting up of monopolies under the protection of this bill.* That is the one question for the Senate to determine.

<sup>1</sup> 62 Cong. Rec., Part 2, p. 2049 (italics supplied).

<sup>2</sup> 62 Cong. Rec., Part 2, p. 2107. (italics supplied).

The Senate committee insists that we shall not authorize that to be done. I understand the position of Senators on the other side to be that we shall, and that is a plain statement of the issue between us.

Mr. Pomerene: Mr. President, am I right in this, then, that *the difference between the two is that under the House bill, if I understand the Senator correctly, there may be a monopoly, but subject to regulation—*

Mr. Walsh (of Montana): Exactly.

Mr. Pomerene: And under the Senate committee bill there may be a monopoly, but without any regulation.

Mr. Walsh (of Montana): No; the Senate committee bill forbids monopoly utterly.

Mr. Pomerene: What is the provision to which the Senator refers as forbidding the monopoly?

Mr. Walsh (of Montana): It will be found on page 5 of the committee substitute, as follows:

Nothing herein contained shall be deemed to authorize the creation of or attempt to create a monopoly, or to exempt any association organized hereunder from any proceedings instituted under the act entitled "An act to create a Federal Trade Commission, to define its powers and duties, and for other purposes," approved September 26, 1914, on account of unfair methods of competition in commerce.\*

Mr. Brandegee: No; I do not find anything in either the House bill or the Senate bill which would prohibit any contract of that kind; in fact, Mr. President, *both the House and the Senate bills would authorize such associations to restrain trade to any degree this side of absolute monopoly; it would authorize every member of any such association to make contracts in violation of the Sherman antitrust law; it would authorize the associations themselves to make such contracts, and then would authorize all the associations to make interlocking contracts with all other associations described in the bill.* It would be possible, in my opinion, under the provisions of the bill for associations of tobacco growers, associations of cotton growers, associations of cattlemen, associations of hide and leather men, associations of sugar men, and all associations of those

\*62 Cong. Rec., Part 2, p. 2122 (italics supplied).

who are producing agricultural products, nuts, fruits, and dairy products, to combine in one grand association. That would be perfectly possible and perfectly lawful, provided it did not bring about an absolute monopoly of the business.<sup>5</sup>

Mr. Brandegee: Mr. President, it is well for us to consider what we are doing and what this bill means, and I will take upon myself the responsibility of saying that the classes of persons named in the bill—to wit, farmers, planters, ranchmen, dairymen, nut or fruit growers,—who are authorized to act in associations outside of the Sherman law, produce and control the entire food and clothing supply of this country. All the cotton and linen and wool, every article of food, animal or vegetable, is controlled by the classes of people *against whom Congress is asked to say we will not longer enforce the Sherman antitrust law, and they may make contracts in restraint of trade, they may increase prices as much as they please, under the House bill, not until some court but until the Secretary of Agriculture*—whose appointment is so largely controlled and influenced by the very classes of people named in this bill—can be persuaded that they are asking an unconscionable price. Nobody can interfere with them, no matter how oppressive the price is or how outrageous; *no suit can be brought, no judicial decision of any kind can be had*, but a Cabinet official—usually appointed after conference with the agricultural interests—is the official who must be satisfied that the price is excessive before the great balance of the country, the great mass of the consumers of the country, can get any relief at all.<sup>6</sup>

Mr. Cummins: \* \* \* If I thought I could wield any influence at all, I would move to strike out section 2 of this bill. I would rather allow the bill to stand as a substantial repeal of the antitrust law with regard to agricultural products than take this further step that is proposed in section 2; but I know that an amendment of that kind is futile. I know I cannot rewrite this bill at this time, and so I have said what I have said.

<sup>5</sup>62 Cong. Rec., Part 3, p. 2171 (italics supplied).

<sup>6</sup>62 Cong. Rec., Part 3, p. 2172 (italics supplied).

simply that I may at least have a clear conscience so far as speech is concerned. My vote may seem to be inconsistent with what I have said, but I must choose between these two alternatives, and I say frankly that I prefer the House text, with all its infirmities, to the Senate substitute for just one reason, and that is that the Senate substitute leaves intact the attempt to create a monopoly, which I think destroys its value entirely.<sup>7</sup>

Mr. Walsh (of Montana): \* \* \* I wish it to be thoroughly understood, as we proceed to vote, that to reject the Senate substitute and to adopt the House text will be to remove the inhibition from setting up any milk monopoly in any one of the great cities of the country, and with no check upon anything they may do in the way of exacting exorbitant prices from consumers, except as it is provided in section 3 [sic] of the bill, the validity of which is open to most serious question, as pointed out in the very persuasive and informing discussion by the Senator from Iowa [Mr. Cummins], which no one has attempted to answer at all, and as to the significance and operation of which even the proponents of the bill differ.<sup>8</sup>

The Government lays much stress upon the fact (Brief for the United States, pp. 64-65) that Mr. Volstead, when he rendered the report for the House Committee on the Judiciary concerning H. R. 2373, stated that in the event that associations authorized by the bill should do anything forbidden by the Sherman Antitrust Act, they would be subject to the penalties imposed by that law. House Report No. 24, 67 Cong., 1 Sess., 61 Con. Rec., Part 1, p. 687. The Government also quotes similar statements made by Mr. Volstead when the bill was debated in the House of Representatives (Brief for the United States, pp. 65-66). Mr. Volstead's colleagues had no such notion of the meaning of the bill. There follow excerpts from the House debates on H. R. 2373:

<sup>7</sup> 62 Cong. Rec., Part 3, p. 2206.

<sup>8</sup> 62 Cong. Rec., Part 3, p. 2279.

Mr. J. M. Nelson: *The purpose of this act is to relieve the farmers from the possible menace of the Sherman law in interstate commerce, is it not?*

Mr. Sanders (of Indiana): *I think so.*

Mr. J. M. Nelson: And it leaves it to the arbitrary action of the Secretary of Agriculture.

Mr. Sanders (of Indiana): In the first place.

Mr. J. M. Nelson: Then what do they gain under this law?

Mr. Sanders (of Indiana): I doubt if they would gain very much.

Mr. Layton: *They would gain this, would they not, that if this act is passed they will not be liable to prosecution?*

Mr. Mills: \* \* \* But this bill goes much further than that. The report says that in so far as the terms of the act are concerned, aside from the mere act of forming an association, they do not apply. *The [Committee] report says that the bill does not eliminate those provisions of the Sherman antitrust law. I beg to differ with that report.*

I should like to point out to you gentlemen that the bill permits the formation of these associations and permits the associations and their members to make necessary agreements to effect such purposes. Now, what are the purposes referred to? Preparing for market, handling and marketing their products for interstate and foreign commerce. It permits them to make any agreement that they see fit to make. *In other words, it permits one of these associations, if necessary, to combine with another interstate association.*

Mr. Husted: Will the gentlemen yield?

Mr. Mills: I am afraid I can not for want of time. As I say, it permits one of these associations, if necessary, to combine with another association in violation of the Sherman Antitrust Act. It permits one association, if necessary, to make an agreement with all other existing associations not to sell to a single commission merchant that sells below a certain price. *It is possible, if it is the intent of the framers of this bill to simply permit the formation of an association*

*or corporation for the purpose of marketing, to say specifically in this bill that the other provisions relating to what these associations shall do after they are formed shall be subject to the provisions of the Sherman Antitrust Act.<sup>10</sup>*

Mr. Hill: Mr. Speaker and gentlemen of the House, this proposed bill to authorize association of producers of agricultural products does two things. It repeals line 5, section 6<sup>11</sup> of the Clayton Act and it also authorizes a type of price agreement which was found illegal under the Sherman Act in the case of the United States against the Standard Sanitary Enamel Co. and 48 other defendants, generally known as the Bathtub Trust case, which was decided in the circuit court of appeals in 1915. If you look at the first page of this bill you will see that it provides that these associations may be corporations with capital stock. That repeals the provision of the Clayton Act in section 6, which says:

Nothing contained in the antitrust laws shall be construed to forbid the existence and operation of labor, agricultural, or horticultural organizations instituted for the purposes of mutual help and not having capital stock—

And so forth.

*So in voting for this bill you vote definitely to repeal the Sherman Act as modified by the act of October 15, 1914, which is known as the Clayton Act. In the second place, you definitely authorize the organization of farmers' corporations for price-fixing agreements. It has been said here that farmers could not organize to physically work together, but they can organize to fix prices, and this bill gives that permission. There is no more reason why you should authorize this in the case of farmers and exempt them from the Sherman and other trust acts than you should in case of bathtub makers or tin-can makers. It is also in violation of the decision of the courts of the United States in the American Can Co. antitrust prosecution. Therefore I shall vote against this bill.*

If this bill, however, is to be passed I think we should have a proper regard for usual and regular

<sup>10</sup> Ibid. (Italics supplied).

law enforcement procedure. *The provision on page 3, line 14, is dangerous and improper in that it authorizes the Secretary of Agriculture to take the place of the Attorney General in instituting the prosecution of cases,* and therefore should this bill come to a reading I shall offer an amendment conforming this bill to the usual procedure in the drug acts and the cattle inspection acts and to the normal procedure in ordinary criminal prosecutions by which the Attorney General, not the Secretary of Agriculture, shall institute any court proceedings.<sup>11</sup>

Mr. Hersey. Mr. Speaker, this bill exempts farmers' cooperative marketing associations from the provisions of the Sherman antitrust law and the Clayton Antitrust Act.<sup>12</sup>

It is significant that the portion of the Report of the House Committee on the Judiciary on H. R. 2373 upon which the Government places so much stress is absent from the Report of the House Committee on the Judiciary on H. R. 13931, which bill, as has already been seen, was virtually identical in terms to H. R. 2373. See House Report No. 939, 66th Cong., 2nd Sess. (1920). In this connection it may be noted that H. R. 13931, after being passed by the House, was passed by the Senate only after the following amendment was added thereto (60 Cong. Rec., Part 1, pp. 376, 377):

"Nothing herein contained shall be deemed to authorize the creation of, or attempt to create, a monopoly, or to exempt any association hereunder from any proceedings instituted under the act entitled 'An Act to supplement existing laws against unlawful restraints and monopolies, and for other purposes,' approved October 15, 1914, on account of unfair methods of competition in commerce."

It will be seen that the amendment proposed and passed by the Senate was designed to make clear the intention of

<sup>11</sup> 61 Cong. Rec., Part 1, p. 1040 (italics supplied).

<sup>12</sup> 61 Cong. Rec., Part 1, p. 1043.

that body that agricultural associations should not be freed from the penalties and restraints imposed by section 2 of the Sherman Act, which condemns monopolies or attempts to create monopolies. The fantastic interpretation placed upon H. R. 2373 by Mr. Volstead in his Committee Report thereon can be explained only by the conjecture that he feared that H. R. 2373, if given its true meaning, would again be amended by the Senate in the same manner as was H. R. 13931.

If such were Mr. Volstead's fears, they were not unfounded. There was indeed an attempt made by the Senate to amend H. R. 2373 in the same way as it had amended H. R. 13931. The amendment proposed and rejected by the Senate is quoted *supra*. This amendment and the discussion thereof in the Senate is referred to by the Government at pages 66 and 67 of its Brief. The Government alleges that the arguments urged in the Senate in favor of the amendment in question do not concern themselves with the possibility of agricultural associations entering into combinations with third persons, but consider only the possibility that such associations might by virtue of their size monopolize the market in central products. The Government's statement of the general tenor of the Senate debates is not altogether accurate; it is not true to say that the possibility of cooperatives combining with third persons was not considered by the legislators. This is revealed not only by the assertions of Senators Kellogg and Brandegee, quoted above, as well as assertions of Representative Mills, but also by the statement of Senator Walsh made in a hearing before the Subcommittee (Senators Norris, Brandegee and Walsh) of the Senate Committee on the Judiciary on S. 4344, the Senate counterpart of H. R. 2373 (hearings before the Subcommittee of the Senate Committee on the Judiciary on S. 4344, 66th Cong., 2nd Sess., p. 28):

"Senator Walsh: \*\*\* We will assume that this farm-

ers' cooperative association of milk producers is highly successful; so much so that it weakens the competition of the independent fellows; *and, catching the trust spirit they enter into a combination by which they gather into their association every other distributor of milk in the city.* After that they have a monopoly of it. Now, you do not want any legislation . . . that will authorize that kind of a combination.

"Mr. Lyman: Senator, I would answer that by saying that section 2 would absolutely take care of that.

"Senator Walsh: How would section 2 take care of it?

"Mr. Lyman: The procedure—the machinery—is laid down—of the Secretary of Agriculture—if he has reason to believe that there is such an association to restrict trade.

"Senator Walsh: Such a combination would be a monopoly.

"Mr. Lyman: It ends up in an injunction by a court.

"Senator Walsh: Yes; but let me ask you, why should a monopoly of that character be tolerated any more than any other kind of a monopoly? Why should you condemn a monopoly . . . of the production of cook stoves in a community? *Why should you say that if the dealers in hardware in a city should all combine and the whole thing be thrown into one combination that shall be unlawful, but if the competitors in marketing milk associate themselves together it shall not be unlawful?"*<sup>12</sup>

Moreover, the reason for the paucity of discussion in the Senate relative to the possibility of agricultural associations entering into combinations with third persons is plain: It was admitted by those who discussed the bill that it exempted agricultural associations from prosecutions under section 1 of the Sherman Act, the section under which the indictment against Pure Milk Association, its officers and agents, was found,—the section concerned with *combinations in restraint of trade.* It was natural, therefore, that the debate in the Senate should be confined to the question

<sup>12</sup> Italics supplied.

of whether or not such associations should be exempted from the provisions of section 2 of the Sherman Act,—the issue raised by the amendment proposed and above referred to. The following excerpts from the debates well illustrates the point just made.

**Mr. Pomerene:** How does the Senator from Montana differentiate between section 2 and section 1 of the Sherman Act? In other words, he wants to preserve the provisions of section 2 with respect to the monopolization of any part of the trade or commerce among the States. The first section, as the Senator knows, declares "every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade" to be illegal. *Is it the Senator's desire to preserve intact the provisions of section 1 of the Sherman law?*

**Mr. Walsh of Montana:** No; it is my desire to get rid of it so far as farm marketing corporations are concerned. That is the answer I made to the Senator from Oregon [Mr. McNary], who asked me what the Senate committee bill gives to the farmers that they have not now. It gives them immunity from section 1 of the Sherman Act and does not give them immunity from section 2 of that act.<sup>14</sup>

• • • • •  
**Mr. Townsend:** • • • The House bill proposes that farmers may organize—I think they can do it under the law now—for the purpose of controlling markets in the sense of taking advantage of the best market possible, consistent with the good of the country. Threats of prosecutions, however, hinder them from organizing. The House bill proposes to permit proper organization. *The proponents of the amendment say that they have no objection to eliminating the possibility of section 1 of the Sherman antitrust law applying to agricultural organizations, but they lay especial emphasis on their claim that section 2 must apply to these organizations.* Why, sir, if this amendment is agreed to, then I submit that the Congress has specifically stated that even though the original intention of the makers of the Sherman antitrust law was not to cover farmers' organizations, it shall

<sup>14</sup> 62 Cong. Rec., Part 3, p. 2180 (italics supplied).

cover those organizations henceforth from the passage of this bill. It would be better to defeat the measure than pass it with this amendment.<sup>15</sup>

It is of major significance that the Senate amendment to H. R. 2373 failed of passage; this failure demonstrates that it was the intention of the Senate that agricultural associations should not be subject to prosecutions under either Section 1 or Section 2 of the Sherman antitrust law.

From the foregoing study of the legislative history of the Capper-Volstead Act, it may be concluded that if that history has any significance whatsoever so far as the interpretation of the law is concerned, it supports the position previously taken by us in this Brief.

#### CONCLUSION.

We submit that if the position taken by the Government in its brief is the proper construction to be placed upon the Clayton Act, Capper-Volstead Act, The Cooperative Marketing Act of 1926, The Agricultural Cooperative Act of Illinois, The Agricultural Adjustment Act of 1933, as amended, The Agricultural Marketing Agreement Act of June, 1937 and kindred acts relating to exemptions and privileges granted agricultural cooperative associations, then the efforts and aims of the several states, as well as the Federal Government, to devise and carry into effect a well considered plan relating to agricultural cooperative associations, would be meaningless.

And if the construction to be placed upon all of these acts is to be in accordance with the principles set forth in the Government's brief, and such associations are to be subjected to indictment without any regard to legislation enacted subsequent to the Sherman Antitrust Act, the result will be to nullify the protection extended agricul-

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<sup>15</sup> 62 Cong. Rec., Part 3, p. 2216 (italics supplied).

ture by the legislatures of the separate states and by the Acts of Congress.

We respectfully pray that the judgment of the lower court be affirmed.

Respectfully submitted,

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## APPENDIX "A".

## SHERMAN ACT.

15 U. S. C. A. (1938 Supp.) §. 1.

Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal: *Provided*, That nothing herein contained shall render illegal, contracts or agreements prescribing minimum prices for the resale of a commodity which bears, or the label or container of which bears, the trade mark, brand, or name of the producer or distributor of such commodity and which is in free and open competition with commodities of the same general class produced or distributed by others, when contracts or agreements of that description are lawful as applied to intrastate transactions, under any statute, law, or public policy now or hereafter in effect in any State, Territory, or the District of Columbia in which such resale is to be made, or to which the commodity is to be transported for such resale, and the making of such contracts or agreements shall not be an unfair method of competition under section 45 of this title, as amended and supplemented: *Provided further*, That the preceding proviso shall not make lawful any contract or agreement, providing for the establishment or maintenance of minimum resale prices on any commodity herein involved, between manufacturers, or between producers, or between wholesalers, or between brokers, or between factors, or between retailers, or between persons, firms, or corporations in competition with each other. Every person who shall make any contract or engage in any combination or conspiracy hereby declared to be illegal shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding \$5,000.00, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court. (As amended August 17, 1937, c. 690, Title VIII, 50 Stat. 693.)

**APPENDIX "B".****CLAYTON ACT.****15 U. S. C. A. § 17.**

The labor of a human being is not a commodity or article of commerce. Nothing contained in the antitrust laws shall be construed to forbid the existence and operation of labor, agricultural, or horticultural organizations, instituted for the purposes of mutual help, and not having capital stock or conducted for profit, or to forbid or restrain individual members of such organizations from lawfully carrying out the legitimate objects thereof; nor shall such organizations, or the members thereof, be held or construed to be illegal combinations or conspiracies in restraint of trade, under the antitrust laws. (Oct. 15, 1914, c. 323, § 6, 38 Stat. 731.)

## APPENDIX "C".

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### CAPPER-VOLSTEAD ACT.

7 U. S. C. A. §§ 291, 292.

*An Act to authorize association of producers of agricultural products.*

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That persons engaged in the production of agricultural products as farmers, planters, ranchmen, dairymen, nut or fruit growers may act together in associations, corporate or otherwise, with or without capital stock, in collectively processing, preparing for market, handling, and marketing in interstate and foreign commerce, such products of persons so engaged. Such associations may have marketing agencies in common; and such associations and their members may make the necessary contracts and agreements to effect such purposes: *Provided, however,* That such associations are operated for the mutual benefit of the members thereof, as such producers, and conform to one or both of the following requirements:

First. That no member of the association is allowed more than one vote because of the amount of stock or membership capital he may own therein, or,

Second. That the association does not pay dividends on stock or membership capital in excess of 8 per centum per annum.

And in any case to the following:

Third. That the association shall not deal in the products of non-members to an amount greater in value than such as are handled by it for members.

SEC. 2. That if the Secretary of Agriculture shall have reason to believe that any such association monopolizes or restrains trade in interstate or foreign commerce to such an extent that the price of any agricultural product is unduly enhanced by reason thereof, he shall serve upon such association a complaint stating his charge in that respect, to which complaint shall be attached, or contained therein, a notice of hearing, specifying a day and place not less than thirty days after the service thereof, requiring the association to show cause why an order should not be made directing it to cease and desist from monopolization or restraint of trade. An association so complained of may at the time and place so fixed show cause why such order should not be entered. The evidence given on such a hearing shall be taken under such rules and regulations as the Secretary of Agriculture may prescribe, reduced to writing, and made a part of the record therein. If upon such hearing the Secretary of Agriculture shall be of the opinion that such association monopolizes or restrains trade in interstate or foreign commerce to such an extent that the price of any agricultural product is unduly enhanced thereby, he shall issue and cause to be served upon the association an order reciting the facts found by him, directing such association to cease and desist from monopolization or restraint of trade. On the request of such association or if such association fails or neglects for thirty days to obey such order, the Secretary of Agriculture shall file in the district court in the judicial district in which such association has its principal place of business a certified copy of the order and of all the records in the proceeding, together with a petition asking that the order be enforced, and shall give notice to the Attorney General and to said association of such filing. Such district court shall thereupon have jurisdiction to enter a decree affirming, modifying, or setting aside said order, or enter such other decree as the court may deem

equitable, and may make rules as to pleadings and proceedings to be had in considering such order. The place of trial may, for cause or by consent of parties, be changed as in other causes.

The facts found by the Secretary of Agriculture and recited or set forth in said order shall be prima facie evidence of such facts, but either party may adduce additional evidence. The Department of Justice shall have charge of the enforcement of such order. After the order is so filed in such district court and while pending for review therein the court may issue a temporary writ of injunction forbidding such association from violating such order or any part thereof. The court may, upon conclusion of its hearing, enforce its decree by a permanent injunction or other appropriate remedy. Service of such complaint and of all notices may be made upon such association by service upon any officer or agent thereof engaged in carrying on its business, or on any attorney authorized to appear in such proceeding for such association, and such service shall be binding upon such association, the officers, and members thereof.

Approved, February 18, 1922. (42 Stat. 388.)

**APPENDIX "D".****COOPERATIVE MARKETING ACT.****7 U. S. C. A. § 455.**

Persons engaged, as original producers of agricultural products, such as farmers, planters, ranchmen, dairymen, nut or fruit growers, acting together in associations, corporate or otherwise, in collectively processing, preparing for market, handling, and marketing in interstate and/or foreign commerce such products of persons so engaged, may acquire, exchange, interpret, and disseminate past, present, and prospective crop, market, statistical, economic, and other similar information by direct exchange between such persons, and/or such associations or federations thereof, and/or by and through a common agent created or selected by them. (July 2, 1926, c. 725, § 5, 44 Stat. 803.)

**APPENDIX "E".****AGRICULTURAL MARKETING ACT.****12 U. S. C. A. § 1141.**

(a) It is hereby declared to be the policy of Congress to promote the effective merchandising of agricultural commodities in interstate and foreign commerce, so that the industry of agriculture will be placed on a basis of economic equality with other industries, and to that end to protect, control, and stabilize the currents of interstate and foreign commerce in the marketing of agricultural commodities and their food products—

- (1) by minimizing speculation.
- (2) by preventing inefficient and wasteful methods of distribution.
- (3) by encouraging the organization of producers into effective associations or corporations under their own control for greater unity of effort in marketing and by promoting the establishment and financing of a farm marketing system of producer-owned and producer-controlled cooperative associations and other agencies.
- (4) by aiding in preventing and controlling surpluses in any agricultural commodity, through orderly production and distribution, so as to maintain advantageous domestic markets and prevent such surpluses from causing undue and excessive fluctuations or depressions in prices for the commodity.

(b). There shall be considered as a surplus for the purposes of this subchapter any seasonal or year's total surplus, produced in the United States and either local or national in extent, that is in excess of the requirements for the orderly distribution of the agricultural commodity

or is in excess of the domestic requirements for such commodity.

(c) The Farm Credit Administration shall execute the powers vested in it by this subchapter only in such manner as will, in the judgment of the administration, aid to the fullest practicable extent in carrying out the policy above declared. (June 15, 1929, e. 24, § 1, 46 Stat. 11; Mar. 27, 1933, Ex. Or. 6084.)

## APPENDIX "F".

### AGRICULTURAL ADJUSTMENT ACT OF 1933.

7 U. S. C. A. §§ 601, 602.

[SECTION 1] It is hereby declared that the disruption of the orderly exchange of commodities in interstate commerce impairs the purchasing power of farmers and destroys the value of agricultural assets which support the national credit structure and that these conditions affect transactions in agricultural commodities with a national public interest, and burden and obstruct the normal channels of interstate commerce. (May 12, 1933 c. 25, Title 1, § 1, 48 Stat. 31, as amended June 3, 1937, c. 296, §§ 1, 2 (a), 50 Stat. 246.)

[SECTION 2] It is hereby declared to be the policy of Congress—

(1) Through the exercise of the powers conferred upon the Secretary of Agriculture under this chapter, to establish and maintain such orderly marketing conditions for agricultural commodities in interstate commerce as will establish prices to farmers at a level that will give agricultural commodities a purchasing power with respect to articles that farmers buy, equivalent to the purchasing power of agricultural commodities in the base period. The base period in the case of all agricultural commodities except tobacco and potatoes shall be the prewar period, August, 1909—July, 1914. In the case of tobacco and potatoes, the base period shall be the postwar period, August, 1919—July, 1929; and, in the case of all commodities for which the base period is the pre-war period, August 1909 to July 1914, will also reflect current interest pay-

ments per acre on farm indebtedness secured by real estate and tax payments per acre on farm real estate, as contrasted with such interest payments and tax payments during the base period. (As amended June 3, 1937, c. 296, §§ 1, 2 (b), 50 Stat. 246, 247.)

(2) To protect the interest of the consumer by (a) approaching the level of prices which it is declared to be the policy of Congress to establish in subsection (1) of this section by gradual correction of the current level at as rapid a rate as the Secretary of Agriculture deems to be in the public interest and feasible in view of the current consumptive demand in domestic and foreign markets, and (b) authorizing no action under this title which has for its purpose the maintenance of prices to farmers above the level which it is declared to be the policy of Congress to establish in subsection (1) of this section. (May 12, 1933, c. 25, Title I, § 2, 48 Stat. 32, as amended August 24, 1935, c. 641, §§ 1, 62, 49 Stat. 750, 782; June 3, 1937, c. 296, §§ 1, 2 (b), 50 Stat. 246, 247.)

**APPENDIX "G".**

**AGRICULTURAL MARKETING AGREEMENT ACT OF 1937.**

**7 U. S. C. A. § 608c.**

**(SEE ALSO APPENDIX "F").**

(1) The Secretary of Agriculture shall, subject to the provisions of this section, issue, and from time to time amend orders applicable to processors, associations of producers, and others engaged in the handling of any agricultural commodity or product thereof specified in subsection (2) of this section. Such persons are referred to in this chapter as "handlers." Such orders shall regulate, in the manner hereinafter in this section provided, only such handling of such agricultural commodity, or product thereof, as is in the current of interstate or foreign commerce, or which directly burdens, obstructs, or affects, interstate or foreign commerce in such commodity or product thereof.

(5) In the case of milk and its products, orders issued pursuant to this section shall contain one or more of the following terms and conditions, and (except as provided in subsection (7) no others:

(A) Classifying milk in accordance with the form in which or the purpose for which it is used, and fixing, or providing a method for fixing, minimum prices for each such use classification which all handlers shall pay, and the time when payments shall be made, for milk purchased from producers or associations of producers. Such prices shall be uniform as to all handlers, subject only to adjustments for (1) volume, market, and production differentials

customarily applied by the handlers subject to such order, (2) the grade or quality of the milk purchased, and (3) the locations at which delivery of such milk, or any use classification thereof, is made to such handlers.

(B) Providing:

(i) for the payment to all producers and associations of producers delivering milk to the same handler of uniform prices for all milk delivered by them: *Provided*, That, except in the case of orders covering milk products only, such provision is approved or favored by at least three-fourths of the producers who, during a representative period determined by the Secretary of Agriculture, have been engaged in the production for market of milk covered in such order or by producers who, during such representative period, have produced at least three-fourths of the volume of such milk produced for market during such period; the approval required hereunder shall be separate and apart from any other approval or disapproval provided for by this section; or

(ii) for the payment to all producers and associations of producers delivering milk to all handlers of uniform prices for all milk so delivered, irrespective of the uses made of such milk by the individual handler to whom it is delivered; subject, in either case, only to adjustments for (a) volume, market, and production differentials customarily applied by the handlers subject to such order, (b) the grade or quality of the milk delivered, (c) the locations at which delivery of such milk is made, and (d) a further adjustment, equitably to apportion the total value of the milk purchased by any handler, or by all handlers, among producers and associations of producers, on the basis of their marketings of milk during a representative period of time. (As amended June 3, 1937, c. 296, §§ 1, 2 (d), 50 Stat. 246, 247.)

(C) In order to accomplish the purposes set forth in paragraphs (A) and (B) of this subsection (5), providing a method for making adjustments in payments, as among handlers (including producers who are also handlers), to the end that the total sums paid by each handler shall equal the value of the milk purchased by him at the prices fixed in accordance with paragraph (A) hereof.

(D) Providing that, in the case of all milk purchased by handlers from any producer who did not regularly sell milk during a period of 30 days next preceding the effective date of such order for consumption in the area covered thereby, payments to such producer, for the period beginning with the first regular delivery by such producer and continuing until the end of two full calendar months following the first day of the next succeeding calendar month, shall be made at the price for the lowest use classification specified in such order, subject to the adjustments specified in paragraph (B) of this subsection (5).

(E) Providing (i) except as to producers for whom such services are being rendered by a cooperative marketing association, qualified as provided in paragraph (F) of this subsection (5), for market information to producers and for the verification of weights, sampling, and testing of milk purchased from producers, and for making appropriate deductions therefor from payments to producers, and (ii) for assurance of, and security for, the payment by handlers for milk purchased.

(F) Nothing contained in this subsection (5) is intended or shall be construed to prevent a cooperative marketing association qualified under the provisions of sections 451 to 457 of this title, known as the "Capper-Volstead Act", engaged in making collective sales or marketing of milk or its products for the producers thereof, from blending the net proceeds of all of its sales in all

markets in all use classifications, and making distribution thereof to its producers in accordance with the contract between the association and its producers: *Provided*, That it shall not sell milk or its products to any handler for use or consumption in any market at prices less than the prices fixed pursuant to paragraph (A) of this subsection (5) for such milk.

(G) No marketing agreement or order applicable to milk and its products in any marketing area shall prohibit or in any manner limit, in the case of the products of milk, the marketing in that area of any milk or product thereof produced in any production area in the United States.

(18) The Secretary of Agriculture, prior to prescribing any term in any marketing agreement or order, or amendment thereto, relating to milk or its products, if such term is to fix minimum prices to be paid to producers or associations of producers, or prior to modifying the price fixed in any such term, shall ascertain, in accordance with section 602 and section 608e of this title, the prices that will give such commodities a purchasing power equivalent to their purchasing power during the base period. The level of prices which it is declared to be the policy of Congress to establish in section 602 and section 608e of this title shall, for the purposes of such agreement, order, or amendment, be such level as will reflect the price of feeds, the available supplies of feeds, and other economic conditions which affect market supply and demand, for milk or its products in the marketing area to which the contemplated marketing agreement, order, or amendment relates. Whenever the Secretary finds, upon the basis of the evidence adduced at the hearing required by section 608b of this title or this section, as the case may be, that the prices that will give such commodities a purchasing power equivalent to their purchasing power during the base period as determined

pursuant to section 602 and section 608e of this title are not reasonable in view of the price of feeds, the available supplies of feeds, and other economic conditions which affect market supply and demand for milk and its products in the marketing area to which the contemplated agreement, order, or amendment relates, he shall fix such prices as he finds will reflect such factors, insure a sufficient quantity of pure and wholesome milk, and be in the public interest. Thereafter, as the Secretary finds necessary on account of changed circumstances, he shall, after due notice and opportunity for hearing, make adjustments in such prices. (As added June 3, 1937, c. 296, § 2 (f), 50 Stat. 246, 247.)

## APPENDIX "H".

### ROBINSON-PATMAN ACT (PRICE DISCRIMINATION).

15 U. S. C. A. (Supp., 1938) § 13a.

It shall be unlawful for any person engaged in commerce, in the course of such commerce, to be a party to, or assist in, any transaction of sale, or contract to sell, which discriminates to his knowledge against competitors of the purchaser, in that, any discount, rebate, allowance, or advertising service charge is granted to the purchaser over and above any discount, rebate, allowance, or advertising service charge available at the time of such transaction to said competitors in respect of a sale of goods of like grade, quality, and quantity; to sell, or contract to sell, goods in any part of the United States at prices lower than those exacted by said person elsewhere in the United States for the purpose of destroying competition, or eliminating a competitor in such part of the United States; or, to sell, or contract to sell, goods at unreasonably low prices for the purpose of destroying competition or eliminating a competitor.

Any person violating any of the provisions of this section shall, upon conviction thereof, be fined not more than \$5,000.00 or imprisoned not more than one year, or both.  
(June 19, 1936, c. 592, § 3, 49 Stat. 1528.)

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NOV 11 1939

CHARLES EDMUND CHORLEY

CLERK

IN THE

# Supreme Court of the United States

OCTOBER TERM, A. D. 1939.

**No. 397**

UNITED STATES OF AMERICA,

*Appellant,*

vs.

THE BORDEN COMPANY, ET AL.,

*Appellees.*

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES,  
FOR THE NORTHERN DISTRICT OF ILLINOIS,  
EASTERN DIVISION.

MOTION OF APPELLEES, HUNDING DAIRY COMPANY, a corporation, and CARL W. HUNDING TO  
DISMISS APPEAL AS TO SAID APPELLEES.

CHARLES S. DENREN,

ROY MASSENA,

DONALD N. SCHAFER,

*Counsel for Hunding Dairy Company  
and Carl W. Hunding.*

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DISMISS APPEAL AS TO SAID APPELLEES.

Come now the appellees, Hunding Dairy Company, a corporation, and Carl W. Hunding, by their counsel, and move that the appeal herein be dismissed as to said appellees.

The ground of said motion is that the record fails to show as to these appellees that the judgment of the

District Court from which this appeal was taken is one of the class of judgments or decisions enumerated in the Criminal Appeals Act, which ground is more fully set forth in the brief filed by these appellees (and the appellee Leland Spencer) under Point I thereof.

CHARLES S. DENEEN,

ROY MASSENA,

DONALD N. SCHAFFER,

*Counsel for Appellees, Hunding Dairy  
Company and Carl W. Hunding.*

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BRIEF OF APPELLEES, HUNDING DAIRY COMPANY,  
a corporation, CARL W. HUNDING  
and LELAND SPENCER.

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*and Carl W. Hunding.*  
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#### INTRODUCTORY STATEMENT

On page 38 of its brief, the government states: "The acts charged in the indictment were committed *at a time when there was no marketing agreement or order in effect in the Chicago market*" [Italics supplied]. This statement of purported fact cannot stand unchallenged. The fact

is that a license<sup>1</sup> issued by the Secretary of Agriculture under the provisions of the Agricultural Adjustment Act of 1933 was in effect in the Chicago market at the time the supposed conspiracies are alleged to have been entered into and for some time thereafter.

The existence of this fact, judicially known to the court, constituted one of the grounds upon which these appellees,<sup>2</sup> and certain other defendants,<sup>3</sup> challenged the indictment in the court below.

Briefs are being submitted on behalf of other appellees answering the principal contentions urged by the government in its brief and also urging additional grounds for sustaining the action of the court below. We find no occasion to reargue or enlarge upon the points discussed in such briefs and shall therefore limit this brief to a discussion of the effect of the Licenses upon the validity of the allegations of the indictment. However, we are opposing jurisdiction of this appeal, further consideration of which the Court has postponed to the hearing on the merits.

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<sup>1</sup> Under Section 8(3) of the Act of May 12, 1933, (48 Stat. 35), the Secretary of Agriculture was empowered to issue licenses for the handling of agricultural commodities. The Act of August 24, 1935, amending the Agricultural Adjustment Act changed the word "licenses" to "orders" (49 Stat. 753).

<sup>2</sup> Motion to quash and demurrs of Hunding Dairy Company (par. B(a), R. 43); Leland Spencer (par. 27, R. 89).

<sup>3</sup> Motion to quash and demurrs of Capitol Dairy Company (par. II 5, R. 48); Sidney Wanzer & Sons, Inc. (par. 6, R. 55); International Dairy Company (par. 6, R. 51); Gordon B. Wanzer (par. 6, R. 52); H. Stanley Wanzer (par. 6, R. 54); Louis Janata (par. 6, R. 57); Milk Dealers' Bottle Exchange (par. 6, R. 67); Western-United Dairy Company (par. 6, R. 58); United Dairy Company (par. 6, R. 61); Western Dairy Company (par. 6, R. 60); Louis G. Glick (par. 6, R. 63); Maurice S. Dick (par. 6, R. 64); Samuel S. Dick (par. 6, R. 66); Associated Milk Dealers, Inc. (par. 15, R. 72).

**THE ISSUES UPON THIS APPEAL ARE NOT LIMITED TO THE GROUND UPON WHICH THE COURT BELOW ACTED.<sup>4</sup>**

The government contends that the only question open to review by this Court is whether the acts charged in the indictment are excluded from the purview of the Sherman Act on the grounds found by the court below. Even if the government's contention were sound, the misstatement of fact in the government's brief, set forth on page 1 hereof, would justify the contention which we are advancing.

However, the government overlooked the recent decision of this Court in *United States v. Curtiss-Wright Export Corp.*, 299 U. S. 304, where a similar contention by the government was rejected (p. 329):

"The government contends that upon an appeal by the United States under the Criminal Appeals Act from a decision holding an indictment bad, the jurisdiction of the court does not extend to questions decided in favor of the United States, but that such questions may only be reviewed in the usual way after conviction. We find nothing in the words of the statute or in its purposes which justifies this conclusion."

• • • The judgment of the lower court is that the statute is invalid. Having held that this judgment cannot be sustained upon the particular ground which that court assigned, it is now open to this court to inquire whether or not the judgment can be sustained upon the rejected grounds which also challenge the validity of the statute and, therefore, constitute a proper subject of review by this court under the Criminal Appeals Act."

The principle deducible from the foregoing decision is that on an appeal by the United States under the Crim-

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<sup>4</sup> Since the Court has reserved the question of jurisdiction of the government's appeal, we make this argument without prejudice to grounds urged in opposition to such jurisdiction.

inal Appeals Act this Court may review any ground urged in the lower court, whether or not sustained by that court, provided such ground constitutes a proper subject of review under the Act. The test in such a case is whether the government could have appealed under the Criminal Appeals Act if the particular ground advanced for review in this Court had been sustained by the court below.

Applying this test to the ground we are urging in support of the judgment below, which the court overruled *pro forma*, it would seem beyond question that the government would have had the right to appeal had the court based its judgment upon such ground. Our challenge to the indictment presents the question whether facts, which are judicially known, bar this prosecution by indictment under the Sherman Act. It differs from a plea in bar only in the respect that the matters urged in bar were judicially known and hence did not require pleading but could be raised upon motion or demurrer. We further suggest that this ground alone of those upon which the indictment was challenged, if it had been sustained below, would have been reviewable as a judgment sustaining a plea in bar.

**SUMMARY OF ARGUMENT.****I.**

This Court does not have jurisdiction under the Criminal Appeals Act for the following reasons:

The judgment of the District Court was not based upon the construction of Section 1 of the Sherman Act but upon the application of the Agricultural Acts to counts of the indictment which that court held otherwise sufficient to state offenses under the Sherman Act.

Jurisdiction cannot be sustained on the ground that the judgment below was one sustaining a special plea in bar, for the reason that no special pleas in bar were either filed or sustained. The demurrers which were sustained cannot be held to be equivalent to special pleas in bar for an issue of law, not of fact, was tendered by such demurrers.

The appeal should be dismissed as to the appellees Hunding Dairy Company and Carl W. Hunding for the reason that it does not affirmatively appear on the face of the judgment below that as to said appellees it was one within the purview of the Criminal Appeals Act.

**II.**

The Court will take judicial notice of the Licenses for the Chicago market issued by the Secretary of Agriculture under express statutory authority. The fact that in January, 1935, the government, by the License then

in force, fixed prices to be paid producers and enforced the base-surplus plan of production, is wholly at variance with the allegations of Counts One and Four of this indictment. The fact that the Secretary discontinued the fixation of resale prices, while he continued actively to regulate the market, amounts to an approval of the acts charged in Count Two. When the Secretary terminated the Licenses, he approved the continuance of the practices thereby enforced.

The legal effect of the enforcement by the Licenses of the acts charged to the defendants and the continuance of such activities with the approval of the government bars the prosecution of the charges in this indictment.

The Sherman Act cannot be construed to demand the prosecution of the defendants by this indictment in the face of facts judicially known to the Court which render this indictment at once inconsistent with public policy and abhorrent to the sense of justice.

The dismissal of the indictment was proper for such facts judicially known justify the conclusion that this particular indictment lies outside the purview of the Sherman Act.

**ARGUMENT.****I.****THIS COURT DOES NOT HAVE JURISDICTION UNDER  
THE CRIMINAL APPEALS ACT.**

The government contends that this Court has jurisdiction of the appeal under the Criminal Appeals Act upon the ground that the judgment of the District Court was based upon the construction of Section 1 of the Sherman Act. The government itself is somewhat doubtful as to jurisdiction upon the above ground and suggests that jurisdiction may be sustained on the ground that the judgment of the court below is one sustaining a special plea in bar. These appellees contend that jurisdiction of this Court cannot be sustained upon either ground.

A. *The judgment of the District Court was not based upon the construction of Section 1 of the Sherman Act but upon the application of the Agricultural Acts to counts of the indictment, which that Court held otherwise sufficient to state offenses under the Sherman Act.*

The government relies upon the opinion of this Court in *United States v. Patten*, 226 U. S. 525, to sustain its contention that the judgment below was based upon a construction of the Sherman Act. That case does not aid the government's contention for the decision there reviewed was that the acts charged in the indictment were not within the condemnation of the Sherman Act, which necessarily, as this Court held, required a construction of that Act to ascertain what it condemned.

Exactly the converse appears from the record in the instant case. As stated by the government, the court below overruled all grounds challenging the counts under consideration other than the ground that the Agricultural Acts had the effect of removing the production and marketing of milk from the purview of the Sherman Act. That the court below did not construe the Sherman Act in arriving at its decision is virtually admitted by the government on page 12 of its brief, for it says:

"It is clear, therefore, that the case comes before this Court in the posture of an indictment sufficient to state an offense in all respects in the manner charged, unless the acts charged in those counts are excluded from the purview of the Sherman Act on the grounds found by the District Court."

If then the court below held that such counts were sufficient to charge offenses under the Sherman Act, while its decision in that respect may be said to have involved a construction of the Sherman Act,<sup>a</sup> *that is not the decision from which the government appealed.* The judgment from which the appeal is taken is one dismissing counts sufficiently charging offenses under the Sherman Act except for the effect given by the court to wholly unrelated Acts. Since the exception upon which the judgment was based was not one contained in Section 1 of the Sherman Act, the application of such exception to this indictment did not involve a construction of that Act.

It is apparent, therefore, that the decision of the District Court was based upon its construction and interpretation of the Agricultural Acts and the resulting application thereof to the counts which it dismissed.

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<sup>a</sup> Cf. *United States v. Patten*, 226 U. S. 525.

*B. Jurisdiction cannot be sustained on the ground that the judgment below was one sustaining a special plea in bar.*

The government does not argue its suggestion that jurisdiction may be sustained on the ground that the judgment of the District Court is one sustaining a special plea in bar, other than to cite certain authorities which are readily distinguishable as hereinafter shown. The explanation for the rather vague and indefinite treatment accorded this suggestion by the government lies in the fact that the record shows that no special pleas in bar were filed by any of the defendants in this case<sup>b</sup> and hence none was sustained by the court below. The government's position in this respect is not aided by the fact that throughout the various documents filed upon this appeal and in its Specification of Errors in its brief, it repeatedly refers to the action of the court "in sustaining said demurrers, motion to quash and special pleas." (R. 97.)

The only intimation as to the government's contention concerning a "special plea in bar" is to be found in the authorities cited on page 22 of its brief. These cases hold that the Court will consider the essential nature of a pleading, rather than the designation given it, to ascertain whether it is in substance a special plea in bar. From this we deduce that the government is suggesting that the demurrers which the court below sustained were in substance special pleas in bar. If this is the basis of the suggestion of the government, we

<sup>b</sup> The fact that no special pleas in bar were filed can be readily ascertained by reference to the "Praecept for transcript of record" filed by the government (R. 118, 119), an examination of which will fail to disclose any special plea among the documents listed.

suggest that its "argument" thereon is answered by the opinion in *United States v. Halsey, Stuart & Co.*, 296 U. S. 451, wherein the Court said:

"We find no basis for the contention that the defendants' motion to quash was in substance a 'special plea in bar' within the meaning of the Criminal Appeals Act."

In *United States v. Storrs*, 272 U. S. 652, the Court held that a plea in abatement could not be converted into a "special plea in bar" by reason of the fact that the Statute of Limitations had run prior to the time the plea in abatement was sustained by the lower court. The Court in an opinion by Mr. Justice Holmes, said with respect to the Criminal Appeals Act (p. 654):

"The statute uses technical words, 'a special plea in bar' and we see no reason for not taking them in their technical sense."

If then a demurrer or motion to quash is held to be the equivalent of a special plea in bar, it can only be so when an issue of fact is tendered thereon, for technically a special plea in bar always raises such an issue, whereas a demurrer tenders an issue of law. It is true that the facts raised in bar may be admitted, for the reason they are contained in the opponent's pleading or are matters judicially noticed. In such cases the issue may be made upon a motion or a demurrer, but the bar arises from the facts in whatever form they are set forth.

In the instant case the demurrers which were sustained tendered an issue of law, i. e., the effect to be given upon the application of statutory law to the indictment. There is no basis for the claim that such demurrers raised fact issues of any sort in bar of the prosecution and there-

fore jurisdiction cannot be sustained on the ground that these demurrers were equivalent to special pleas in bar.

C. It does not affirmatively appear that the judgment below dismissing the indictment as to the defendants *Hunding Dairy Company and Carl W. Hunding* was as to said defendants one within the purview of the Criminal Appeals Act.

The appellees Hunding Dairy Company and Carl W. Hunding have filed a motion to dismiss the appeal as to said appellees upon an additional ground, which is not applicable to the appellee Spencer for reasons to be stated.

The record discloses that the court below did not sustain the motion to quash and demurrer filed by these appellees<sup>c</sup> as to any of the three counts under consideration (R. 115-118). The order and judgment appealed from dismissed the indictment as to all defendants (R. 118), which necessarily included these appellees. But there is no affirmative showing on the face of said order that the judgment dismissing the indictment as to these appellees was one within the purview of the Criminal Appeals Act. In *United States v. Hastings*, 296 U. S. 188, 192, this Court held that jurisdiction of appeals by the government in criminal prosecutions was confined to the cases enumerated therein, and cited the fact that a proposal to confer a broader jurisdiction was considered by Congress and rejected.

Prior to the enactment of the Criminal Appeals Act, this Court in *United States v. Sanges*, 144 U. S. 310, 312, after reviewing numerous decisions of state courts, held

<sup>c</sup> As used in this Point I-C "these appellees" refers solely to Hunding Dairy Company and Carl W. Hunding.

that the government had no right to review a judgment in favor of the defendant in a criminal case, except under and in accordance with express statutes, whether the judgment was rendered upon a verdict or the sustaining of a demurrer or motion to quash.

Since the Criminal Appeals Act confers an exceptional right to review in favor of the government, it must be construed strictly, as was held in *United States v. Dickinson*, 213 U. S. 92, at page 103:

“So far as that statute is an innovation in criminal jurisdiction in certain classes of prosecutions, it cannot be extended beyond its terms.”

The jurisdiction of this Court to review judgments of state courts of last resort is likewise limited by the statutory provisions conferring such jurisdiction. In *Whitney v. California*, 274 U. S. 357, this Court set forth the long established rule as to such jurisdiction, on page 360:

“It has long been settled that this court acquires no jurisdiction to review the judgment of a state court of last resort on a writ of error, unless it affirmatively appears on the face of the record that a Federal question constituting an appropriate ground for such review was presented in and expressly or necessarily decided by such state court.” [Italics supplied.]

And in *Oxley Stave Co. v. Butler County*, 166 U. S. 648, it was held (p. 655):

“Upon like grounds the jurisdiction of this court to reexamine the final judgment of a state court cannot arise from mere inference, \* \* \* ”

The principles stated in the above cases are applicable to appeals under the Criminal Appeals Act (Cf. *United States v. Hastings*, 296 U. S. 188, at page 193), and there-

fore in such cases the judgment appealed from must show on its face, not as a matter of inference, but affirmatively, that it is one within the purview of that Act as to all of the appellees.

In *United States v. Carter*, 231 U. S. 492, this Court dismissed for want of jurisdiction an appeal by the government from a judgment sustaining a demurrer to certain counts because they were "bad in law." The Court refused to accede to the government's proposition that the entire record should be examined to determine the question of jurisdiction under the Criminal Appeals Act, saying on page 493:

"But the right to a review in a criminal case, being controlled by the general law, it follows that a case cannot be brought within the control of the special rule provided by the criminal appeals act unless it clearly appears that the exceptional, and not the general, rule applies." [Italics supplied.]

Applying the principles of the foregoing cases to the judgment appealed from, which dismissed the indictment as to these appellees, it does not affirmatively appear that said judgment *as to these appellees* was based upon any of the grounds specified in the Criminal Appeals Act.

The "Specifications of Errors to be Urged" in the government's brief (pp. 12-15) reveals that but one of the alleged errors so specified relates to any action by the court below affecting these appellees. The first specification (pp. 12, 13) alleges error in sustaining the various demurrers, motion to quash and special pleas of named defendants, including these appellees, to Counts One, Two and Four. Neither this specification nor the one following (pp. 13, 14), which refers to "said demurrers, motions to quash, and special pleas", is supported by the record as to these appellees, for the court below did not sustain

their motion to quash and demurrer to Counts One, Two and Four (R. 115, 116). In like manner, the third specification of error (pp. 14, 15), which concerns the action of the court below upon demurrers of the Pure Milk Association and other defendants, not including these appellees, has no application to these appellees. It appears, therefore, that only the fourth specification of error (p. 15) alleging that the court erred,

“In dismissing Counts One, Two, and Four of the indictment in the above entitled cause as to all of the defendants,”

applies to these appellees.

However, said fourth specification, above quoted, is as defective as the judgment at which it is directed, in not affirmatively showing that the dismissal of the indictment as to these appellees was based upon a ground enumerated in the Criminal Appeals Act.

Under the authorities cited, the appeal as to these appellees cannot be brought within the exceptional rule of the Criminal Appeals Act in the absence of an affirmative showing upon the face of the judgment that it applies, and we therefore submit that the appeal should be dismissed as to the appellees, Hunding Dairy Company and Carl W. Hunding.

## II.

**THE DISMISSAL OF THE INDICTMENT WAS PROPER,  
FOR FACTS JUDICIALLY KNOWN SHOW THAT THE  
GOVERNMENT ITSELF COMPELLED THE ACTS WHICH  
THE DEFENDANTS WERE CHARGED WITH CONSPIR-  
ING TO DO.**

The court below held that *no* indictment will lie under section 1 of the Sherman Act with respect to the marketing of agricultural products, including milk, because the

production and marketing of agricultural products are removed from the purview of the Sherman Act by the Act of May 12, 1933 as amended and reenacted (R. 115). However, with respect to the counts of *the particular* indictment here under review, it is not essential to the affirmance of the judgment of the District Court that the broad proposition upon which that court acted be sustained.<sup>5</sup> The application to these counts of facts judicially known shows that the dismissal thereof was proper under the very arguments by which the government in its brief seeks to avoid the decision of the court below,<sup>6</sup> i. e. there must be immunity from prosecution under the Sherman Act where the government either compels or approves acts which are alleged to constitute a violation of the Sherman Act. On page 29 of its brief, the government again incorrectly states that no regulation under the Agricultural Acts was in effect when the acts charged in the indictment were committed, but it virtually concedes that the Sherman Act has no application to activities covered by the License [which was in effect], in the following statement:

“The purpose of this aid is to secure parity prices to farmers, without destroying competition or preventing the application of the Sherman Act to activities in the distribution of the product not specifically covered by marketing agreements or orders.” [Italics supplied.]

We contend that by imposing and enforcing licenses under the authority of the Agricultural Adjustment Act, the government did, and compelled the defendants to do, the very acts which its indictment charges that the de-

<sup>5</sup> In making this statement, we do not intend to detract in any wise from the arguments presented in briefs of other appellees in support of the holding of the court below.

<sup>6</sup> See Government's Brief, Point II, C, 2 (pp. 37-40).

fendants conspired to do. Our contention resolves itself into this question: Can acts in compliance with an executive order having the force of law be the subject of an indictment under another law?

*A. The Court will take judicial notice of the Licenses issued by the Secretary of Agriculture under express statutory authority.*

Except for the fact that the government questioned the right of the court below to take judicial notice of these Licenses, we would not deem it necessary to argue that proposition. Such Licenses were issued by the Secretary of Agriculture under authority vested in him by the Agricultural Adjustment Act. It would seem self-evident that executive orders having the force and effect of law are as much the subject of judicial notice as the Act which authorized the issuance of such orders.

The leading case on the subject of judicial notice in this Court is *Jones v. United States*, 137 U. S. 202. In that case, in which judicial notice was taken of proclamations, correspondence and records of the head of an executive department, this Court considered the effect of the facts so judicially noticed upon the allegations of the indictment there involved, saying (p. 216):

"These allegations, indeed, if inconsistent with facts of which the court is bound to take judicial notice, could not be treated as conclusively supporting the verdict and judgment."

In *Heath v. Wallace*, 138 U. S. 573, following the *Jones* case this Court said (p. 584):

"We think we may take judicial notice of such official statements made by the head of one of the branches of the executive department, especially as they relate to the public records under his control."

More specifically with respect to the particular matter of judicial notice here presented, this Court held in *Cahill v. United States*, 152 U. S. 211, at page 222:

"Questions of a kindred nature have been frequently presented, and it may be laid down as a general rule, deductible from the cases, that wherever, by the express language of any Act of Congress, power is entrusted to either of the principal departments of government to prescribe rules and regulations for the transaction of business in which the public is interested, and in respect to which they have a right to participate, and by which they are to be controlled, the rules and regulations prescribed in pursuance of such authority become a mass of that body of public records of which the courts take judicial notice."

Any remaining doubt as to the right of the Court to take judicial notice of these Licenses is dispelled by the case of *Thornton v. United States*, 271 U. S. 414, where the Court said concerning regulations issued by the Secretary of Agriculture pursuant to statutory authority, (p. 420):

"Under date of June 15, 1916, various regulations were issued by the Secretary of Agriculture. They are not printed in the record, but they are matters of which we may take judicial notice."

Licenses or orders issued by the Secretary since the effective date of the Federal Register Act (July 26, 1935, 49 Stat. 500) must be published in the Federal Register, the contents of which are required by said Act to be judicially noticed. Although the Licenses here involved antedated the effective date of that Act, the provisions thereof as to judicial notice of executive orders may be said to be declaratory of the law as it already existed under the foregoing decisions of this Court.

The Chicago market was the first to be regulated by the Secretary under the Agricultural Adjustment Act of 1933. On July 28, 1933 the Secretary issued License No. 1 for the "Chicago Milk Shed." This License,<sup>7</sup> as amended in certain minor particulars, was in effect from August 1, 1933 until January 1, 1934, at which time it was terminated by the Secretary.

On February 3, 1934 the Secretary issued a new license, "License No. 30 for the Chicago, Illinois, Sales Area," which was in effect, as amended from time to time, from February 5, 1934 to March 2, 1935.<sup>8</sup> This license was in effect during a portion of the period covered by the indictment, *for each of the counts of the indictment under consideration charges a conspiracy entered into in the month of January, 1935.*<sup>9</sup> At the time the order terminating License No. 30 was signed by the Secretary, the Department of Agriculture, through the Agricultural Adjustment Administration, stated:<sup>10</sup>

"The decision to terminate the Chicago milk license came as a result of a telegram from the Pure Milk Association on February 28, stating that Association had completed contractual relationship with distributors in the sales area and reached full agreement with them, and asking immediate suspension of the license."

<sup>7</sup> License No. 1 is set forth in Appendix A, *infra* page 29.

<sup>8</sup> Amended License No. 30, in effect from December 2, 1934 to March 2, 1935 is set forth in Appendix B, *infra* page 38.

<sup>9</sup> Count One (R. 11); Count Two (R. 17); Count Four (R. 25).

<sup>10</sup> Official Press Release of U. S. Department of Agriculture No. 1672-35.

B. *The fact that in January, 1935, the government, by its License then in effect, fixed prices to be paid producers and enforced the base-surplus plan of production and payment, is wholly at variance with the allegations of Counts One and Four.*

Count One charges that in January, 1935 the defendants entered into a conspiracy, the object of which was to fix and maintain non-competitive prices to be paid to all producers by all distributors for all fluid milk shipped into Chicago; that such object was effected by a meeting in January, 1935 of the major distributors, the Pure Milk Association and the Associated Milk Dealers, Inc., at which said parties fixed and agreed upon uniform terms and conditions for the purchase of milk, which are referred to therein as "price provisions". (R. 11, par. 47-49.)

By Count Four the defendants are charged with combining, in January, 1935, to restrict and control the supply of fluid milk moving in the channels of interstate commerce into Chicago; through the enforcement of the base-surplus plan of production by the Pure Milk Association and the agreements of the major distributors to pay for fluid milk purchased by them in accordance with said base-surplus plan. (R. 25, 26; par. 88-90.)

But the provisions of the Amended License, in effect in the Chicago market during January, 1935 and until March 2, 1935, reveal that the defendants could not have conspired and combined to fix prices and enforce the base-surplus plan as alleged in Counts One and Four. Said License, and all of the licenses in effect prior thereto, not only fixed prices to be paid producers but also recognized and enforced the base-surplus plan as an integral part of the program thereby established.

As evidence of the fact that the charges of price fixing against the defendants in Count One were identical with the provisions of the Amended License in force in January, 1935, and thereafter, we quote the "price provisions" set forth in paragraph 49 of the indictment (R. 11), and in parenthesis after each such provision we set forth a reference to similar provisions in the Amended License appended hereto.

- "(i) Provision as to prices." (Articles V, VIII, pp. 45, 48);
- "(ii) Provision as to the basis for computing price." (Articles V, VIII, pp. 45, 48);
- "(iii) Provision as to the classification of milk for the purpose of pricing." (Article IV, p. 43);
- "(iv) Provision as to the quantity of milk to be purchased through Pure Milk Association." (Article IV, section 4, pp. 44, 45);
- "(v) Provision as to the time and place of delivery." (Article XI, section 2, p. 53);
- "(vi) Provision as to time and terms of payment." (Articles IX, XII, pp. 50, 53).

All distributors marketing milk in the Chicago Sales Area were licensed subject to the terms and conditions set forth in said Amended License.<sup>11</sup> Distributors were required to purchase milk produced by producers having a base,<sup>12</sup> and the prices to be paid such producers were fixed solely with reference to the bases established therein.<sup>13</sup>

Moreover, this License gave complete recognition to the base-surplus plan established by the Pure Milk Asso-

<sup>11</sup> Appendix B, Art. I, *infra* pages 40, 41.

<sup>12</sup> Appendix B, Art. IV, sec. 4, *infra* pages 44, 45.

<sup>13</sup> Appendix B, Art. IX, Sec. 1, *infra* page 50.

ciation. Bases for producers under said License were allotted as follows:

For producers who were members of the Pure Milk Association, bases as recorded in the records of such Association;<sup>14</sup> and

For producers who were not members of such Association, bases were allotted by the Market Administrator, which were required to be equitable as compared with the bases of producers who were members of such Association.<sup>15</sup>

It is apparent that the entire scheme of regulation established by these Licenses was founded upon the base-surplus plan previously adopted by the Pure Milk Association.<sup>16</sup>

We submit that the foregoing review of the provisions of said License shows that the defendants could not have combined to fix prices and agreed to enforce the base-surplus plan other than in accordance with its provisions, but any possible doubt on this score is removed by the following section of said License:<sup>17</sup>

"Any contract or agreement entered into by a distributor prior to the effective date of this License, covering the purchase, delivery and/or sale of milk and its products, shall be deemed to be superseded by the terms and provisions of this License insofar as such contract or agreement is inconsistent with any provision of this License."

It is evident, therefore, that the allegations of Counts One and Four are wholly inconsistent with facts judicially known and that the defendants could not have combined as therein alleged, for any acts of the defendants, with

<sup>14</sup> Appendix B, Exhibit A, sec. 1, par. 1, *infra* page 58.

<sup>15</sup> Appendix B, Exhibit A, sec. 1, par. 2, *infra* page 58.

<sup>16</sup> Appendix B, Article II, sec. 1, par. 13-19, *infra* pages 42, 43.

<sup>17</sup> Appendix B, Article V, sec. 6, *infra* page 47.

respect to prices to producers pursuant to the base-superplus plan, were required and enforced by the License imposed by the government.

*C. The fact that the Secretary discontinued the fixation of resale prices, while he continued actively to regulate the market, amounts to an approval of the acts charged in Count Two. When the Secretary terminated the Licenses, he approved the continuance of the practices thereby enforced.*

The Licenses which we are considering were issued by the Secretary under authority granted by the Agricultural Adjustment Act as it existed prior to the amendments thereto enacted on August 24, 1935. The original Act,<sup>17</sup> empowering the Secretary to issue such Licenses, contained none of the detailed provisions which were incorporated in the amendments of August 24, 1935 and carried into the Agricultural Marketing Agreement Act of 1937.<sup>18</sup>

Acting under the broad powers granted by the Agricultural Adjustment Act the Secretary, by the first series of Licenses for the Chicago market in effect from August 1, 1933 to January 1, 1934, required all distributors to distribute and sell fluid milk at prices therein scheduled and under the terms and conditions therein set forth.<sup>19</sup> The second series of Licenses for the Chicago Area, in

<sup>17</sup> The pertinent provisions of Section 8 (3) of the Agricultural Adjustment Act of 1933 are quoted in the Licenses. See Appendix A, *infra* pages 38, 39.

<sup>18</sup> The discussion in the government's brief (pp. 47-50) of alleged limitations on the power of the Secretary with respect to the issuance of orders and the provisions to be contained therein, has reference solely to the provisions of the Marketing Agreement Act of 1937.

<sup>19</sup> Appendix A, Art. III, par. 3, *infra* page 32.

effect from February 5, 1934 to March 2, 1935, did not contain any provisions as to resale prices.

Count Two charges that the defendants combined in January, 1935 to fix and maintain prices for the sale of fluid milk by the distributors in the City of Chicago. (R. 17, par. 63.) It is alleged that an agreement fixing resale prices was made in January, 1935. At that time, however, the Secretary was regulating the Chicago market under License No. 30, although he had then discontinued the fixation of resale prices.

What construction then should be placed on the fact that the Secretary discontinued the schedule of resale prices in the License regulating this market? The basic Act under which the Secretary had theretofore fixed such prices remained unchanged. It must therefore be concluded that the Secretary determined either that he lacked power under the Act to fix prices for sales of milk in the City of Chicago for the reason that such sales did not constitute transactions in interstate commerce, or that it was not necessary to fix resale prices in order to effectuate the declared policy of the Act.

If the Secretary determined that he had no power to act with respect to resale prices, considerable weight must be given to his determination as being a practical construction by the administrator of the Act supporting the contention argued here by other appellees that the charges in Count Two did not affect interstate commerce.

On the other hand if the Secretary did not recede from his former position that he had power to fix resale prices, his determination that it was not necessary to do so, while he continued actively to regulate the Chicago market, amounts to an approval of the acts which are alleged in Count Two to have been committed during such time.

For if the acts charged to the defendants concerning resale prices in Count Two tended to prevent the effectuation of the declared policy of the Act by restraining interstate commerce during the period when the License was in force, the Secretary could have fixed such resale prices in the same manner as he had theretofore.

In the court below the government stated that even assuming that all of the activities of the defendants from January, 1935 to March 2, 1935 were legal, clearly their activities since March 2, 1935 were illegal. Although the last series of Licenses were terminated by the Secretary on March 2, 1935, their effect on the charges in the indictment is not limited to the period stated. The act of the Secretary in withdrawing active regulation of the Chicago market on March 2, 1935 was not taken on mere caprice but rather because he was satisfied that conditions in the market were such that the declared policy of the Act would continue to be effectuated without such regulation. For on March 2, 1935, when the order terminating the License was released, the Department of Agriculture stated:<sup>20</sup>

*"The decision to terminate the Chicago milk license came as a result of a telegram from the Pure Milk Association on February 28, stating that Association had completed contractual relationship with distributors in the sales area and reached full agreement with them, and asking immediate suspension of the license."* [Italics supplied.]

The contracts between the Pure Milk Association and the distributors referred to in the above statement are the agreements which are set forth in the indictment as the means by which the alleged conspiracies were effected. (R. 12, par. 50; R. 17, par. 65; R. 26, par. 91).

<sup>20</sup> Official Press Release of the U. S. Department of Agriculture, Agricultural Adjustment Administration, No. 1672-35.

It thus appears from facts judicially noticed that the Government during the period prior to March 2, 1935 enforced and approved the acts which the indictment charged as constituting violations of the Sherman Act, and furthermore that governmental enforcement of such practices was withdrawn only when the Secretary was satisfied that the policies put into effect by the Licenses would be continued by contractual relationship of the parties concerned.

*D. The enforcement by the Licenses of the acts charged to the defendants and the continuance of such activities with the approval of the government bars the prosecution of the charges in this indictment.*

What then is the legal effect of the fact that the government compelled the acts charged to the defendants during the period when the Licenses were in force and approved the continuance of such activities when active enforcement under the Licenses was withdrawn?

No citation of authority is necessary for the proposition that an act compelled by an executive order having the force of law cannot be made the subject matter of a charge that some other law was violated. The Agricultural Adjustment Act provided that any person engaged in handling agricultural commodities without a license as required by the Secretary under Section 8(3) should be subject to a fine of not more than \$1,000 for each day during which such violation continued. The Secretary had power to suspend or revoke any such license for violations of the terms and conditions thereof. [Act of May 12, 1933, sec. 8(3), 48 Stat. 35.]

It is apparent that to the extent that the acts charged in the indictment were compelled by the penal provisions

of the Act authorizing the Licenses, they were not illegal under the Sherman Act.

Moreover, the fact that the activities of the defendants were continued with governmental approval after the Licenses were withdrawn renders such activities lawful under a rule cited in the government's brief in this case,<sup>21</sup> to-wit:

"This view is in accord with the rule that governmental approval would render such an agreement lawful. *United States v. United States Steel Corp.*, 251 U. S. 417, 446; *Fosburgh v. California & Hawaiian Sugar Refining Co.*, 291 Fed. 29, 36, 37."

The defense of entrapment by law enforcing officers is somewhat analogous to the situation here presented. In *Sorrells v. United States*, 287 U. S. 435, this Court, in an opinion by Mr. Chief Justice Hughes, said concerning the defense of entrapment by a government prohibition agent in a prosecution for violation of the National Prohibition Act (p. 448):

"If the requirements of the highest public policy in the maintenance of the integrity of administration would preclude the enforcement of the statute in such circumstances as are present here, the same considerations justify the conclusion that the case lies outside the purview of the Act and that its general words should not be construed to demand a proceeding at once inconsistent with that policy and abhorrent to the sense of justice."

This opinion of the Court is so applicable to the contention we have argued, presenting as it does, not a case of entrapment by a mere government agent but rather one of compulsion by orders issued by the head of an executive department under statutory authority, that we conclude this argument by paraphrasing such opinion.

<sup>21</sup> See Government's Brief, page 40, footnote 18.

Public policy must preclude the enforcement of the Sherman Act against the defendants whose alleged offense thereunder consisted of activities compelled by law. The same considerations justify the conclusion that *the particular* indictment under review lies outside the purview of the Sherman Act, not merely because of the provisions of the Agricultural Acts<sup>22</sup> as held by the court below, but rather because of the specific exercise of power granted by such Acts in enforcing the activities charged to the defendants in such indictment.

The Sherman Act cannot be construed to demand the prosecution of the defendants by this indictment in the face of facts judicially known to the Court which render such indictment at once inconsistent with public policy and abhorrent to the sense of justice.

#### CONCLUSION.

For the reasons stated herein, the judgment of the court below as to Counts One, Two and Four of the indictment was correct and should be affirmed.

Respectfully submitted,

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ROY MASSENA,

DONALD N. SCHAFER,

*Counsel for Hunding Dairy  
Company and Carl W. Hunding.*

BEN H. MATTHEWS,

JAMES P. DILLIE,

*Counsel for Leland Spencer.*

<sup>22</sup> By "Agricultural Acts" we mean the Act of May 12, 1933 (48 Stat. 31), as amended August 24, 1935 (49 Stat. 750) and as reenacted and amended by the Agricultural Marketing Agreement Act of 1937 (50 Stat. 246). See R. 115.

**APPENDIX A.**

**UNITED STATES**  
**DEPARTMENT OF AGRICULTURE**  
**AGRICULTURAL ADJUSTMENT ADMINISTRATION**

**LICENSE SERIES—LICENSE No. 1**

**LICENSE FOR MILK—CHICAGO MILK SHED**

Issued by the Secretary of Agriculture, July 28, 1933.  
Effective date August 1, 1933 (12:01 p. m., Eastern Standard Time).

**I.**

As used in this license, the following words and phrases shall be defined as follows:

[Definitions not copied.]

**II.**

Whereas it is provided by section 8 of the act as follows:

“Sec. 8. In order to effectuate the declared policy the Secretary of Agriculture shall have power—

“(3) To issue licenses permitting processors, associations of producers, and others to engage in the handling, in the current of interstate or foreign commerce, of any agricultural commodity or product thereof, or any competing commodity or product thereof. Such licenses shall be subject to such terms and conditions not in conflict

with existing acts of Congress or regulations pursuant thereto as may be necessary to eliminate unfair practices or charges that prevent or tend to prevent the effectuation of the declared policy and the restoration of normal economic conditions in the marketing of such commodities or products thereof and, the financing thereof . . . .

"(4) To require any licensee under this section to furnish such reports as to quantities of agricultural commodities or products thereof bought and sold and the prices thereof and as to trade practices and charges, and to keep such systems of accounts, as may be necessary for the purpose of part 2 of this title."

And

Whereas by virtue of the authority vested in the Secretary by the act the Secretary, with the approval of the President, has issued regulations entitled "Milk Regulations, Agricultural Adjustment Administration, Series 1," and

Whereas it is provided by section 200 of said regulation as follows:

"200. *Necessity for issuance of licenses.*—The Secretary of Agriculture having determined that it is necessary to issue licenses, in order to prevent unfair practices or charges that prevent or tend to prevent (1) the effectuation of the declared policy of the act with respect to milk and its products, and (2) the restoration of normal economic conditions in the marketing of milk and its products and the financing thereof, licenses shall be issued under the act, subject to the limitations of and in accordance with the provisions of these regulations, to persons engaged in the handling of milk or products thereof in the current of interstate or foreign commerce"; and

Whereas the Secretary, acting under the provisions of the act, for the purpose and within the limitations therein contained, after due notice and opportunity for hearing to interested parties given pursuant to the provisions of said act and the regulations issued thereunder and after due consideration, has on the 28th day of July 1933 executed under his hand and the official seal of the Department of Agriculture a certain agreement entitled "Marketing Agreement for Milk, Chicago Milk Shed", a copy of which is hereto attached as appendix I; and

Whereas the Secretary finds that the marketing of milk for distribution as fluid milk in the Chicago metropolitan area and the distribution of said fluid milk affects and enters into both the current of interstate commerce and the current of intrastate commerce which are inextricably intermingled; and

Whereas the Secretary finds that said agreement is a marketing agreement between the Secretary and persons engaged in the handling of milk and its products within the meaning of section 8 (2) of the act in the current of interstate commerce and effectuates the declared policy of the act; and

Whereas the Secretary finds that practices and charges contrary to the several provisions of said agreement would constitute unfair practices and charges that would prevent or tend to prevent the effectuation of the declared policy of the act with respect to milk and its products and the restoration of normal economic conditions in the marketing of milk or its products and the financing thereof, and finds that licenses should be issued as hereinafter provided to eliminate such practices and charges,—

### III.

Now, therefore, the Secretary of Agriculture, acting under the authority vested in him as aforesaid,

Hereby licenses each and every distributor of fluid milk for consumption in the Chicago metropolitan area to engage in the handling in the current of interstate or foreign commerce of said fluid milk subject to the following terms and conditions:

1. The schedule governing the prices, at which and the terms and conditions under which milk shall be purchased from producers by distributors for distribution as fluid milk, shall be that set forth in exhibit A, which is attached hereto and made a part hereof. Payments to Milk Foundation, Inc., a nonprofit corporation organized and existing under the laws of the State of Illinois, made pursuant to paragraph 4 hereof and like payments to Pure Milk Association made pursuant to membership agreements, shall respectively be deemed part of the price paid to producers.

2. Every distributor of fluid milk shall purchase milk only from producers having a base. Such base shall be the amount reported to such distributor as being in conformity with the plan governing the marketing of milk set forth in exhibit B, which is attached hereto and made a part hereof. Such base shall be reported by the Pure Milk Association (a corporation organized under the laws of the State of Illinois) in the case of producers who are members of the Pure Milk Association, and by a duly authorized representative of such producers in the case of producers not members of the Pure Milk Association. The provisions of this paragraph shall not be applicable in respect of producers not having a base on the effective date of this license, until on and after September 1, 1933.

3. The schedule governing the prices at which and the terms and conditions under which fluid milk shall be distributed and sold by distributors shall be those defined and set forth in exhibit C, which is attached hereto and made a part hereof.

4. The distributors shall not purchase milk from any producer not a member of the Pure Milk Association unless such producer authorizes the purchasing distributor to pay over to the said Milk Foundation, Inc., the same amount per hundred pounds of milk purchased which the members of the Pure Milk Association are then authorizing the distributors to pay over to the Pure Milk Association on behalf of its members, and said purchasing distributor shall simultaneously with making payment to the producer for milk purchased, make payment as aforesaid to said Milk Foundation, Inc. The sums so paid shall be kept as a separate fund by said Milk Foundation, Inc., for the purpose of securing to said producers not members of the Pure Milk Association advertising, educational, credit loss, and other benefits similar to those which are secured by the members of the Pure Milk Association by virtue of their like payments to said Pure Milk Association.

5. The distributors shall severally maintain systems of accounting which shall accurately reflect the true account and condition of their respective businesses. Their respective books and records shall, during usual hours of business, be subject to the examination of the Secretary

(or his duly authorized representative) to assist him in the furtherance of his duties with respect to this license, including verification by the Secretary of the information furnished on the forms hereinafter referred to. The distributors shall severally, from time to time, furnish information to the Secretary on and in accordance with forms to be supplied by him. All information obtained by or furnished to the Secretary pursuant to this paragraph shall remain the confidential information of the Secretary, and shall not be disclosed by him except upon lawful demand made by the President, by either House of the Congress or any committee thereof, or by any court. The Secretary, however, may combine the information obtained from distributors in the form of general statistical studies or data. The Secretary shall issue rules and regulations and prescribe penalties to be imposed in the event of any violations of the confidences or trust imposed hereby.

6. Every distributor shall purchase for sale for consumption as fluid milk only such milk as complies with the standards governing the production, receiving, transportation, processing, and distribution of fluid milk established pursuant to and in accordance with the health ordinances of the city of Chicago, except in those areas within the Chicago metropolitan area where the health ordinances of any other municipality are in full force and effect.

7. The Schedule of Fair Practices, set forth in exhibit D, which is attached hereto and made a part hereof, shall be the Schedule of Fair Practices for distributors in the Chicago metropolitan area.

8. The invalidity of any of the terms and conditions of this license shall not affect in any way the other terms and conditions thereof.

9. This license shall take effect as to every distributor upon the date set forth herein above the signature of the Secretary.

#### IV.

In witness whereof I, Henry A. Wallace, Secretary of Agriculture, do hereby issue this license in the city of Washington, District of Columbia, on this 28th day of

July 1933, and pursuant to the provisions hereof declare this license to be effective on and after 12:01 p. m. eastern standard time, August 1, 1933.

HENRY A. WALLACE,  
*Secretary of Agriculture*

## EXHIBITS TO LICENSE

### EXHIBIT A. RULES FOR MILK PRODUCTION, PRICES, AND AMOUNTS

#### I. PRICES TO BE PAID PRODUCERS.

1. The price to be paid to any producer for milk shall be determined with reference to the producer's base determined under exhibit B. For the purpose of determining such price, milk delivered by the producers shall be classified as follows:

*Class 1.*—An amount equal to 90 percent of the producer's base.

*Class 2.*—An amount equal to 10 percent of the producer's base.

*Class 3.*—The rest of the milk delivered by the producer.

2. The price to be paid any producer for the seven classes of milk shall be as follows:

*Class 1.*—\$1.75 per hundredweight for milk of 3.5 percent butterfat content, subject to a butterfat differential of 4 cents per one tenth of 1 percent butterfat content below or above 3.5 percent.

*Class 2.*—Three and one half times the average price in the Chicago market for the calendar month during which the milk is sold, of 92 score creamery butter sold at wholesale plus 20 percent of such resulting figure, such amount to be adjusted by the butterfat content differential specified with reference to class 1 milk.

*Class 3.*—Three and one-half times the average price in the Chicago market for the calendar month during which the milk is delivered, of 92 score creamery butter sold at wholesale to be adjusted by the butterfat content differential specified with reference to class 1 milk.

differential specified with reference to class 1 milk, plus 3 cents per hundred weight.

3. All prices to the producer for milk shall be f. o. b. country plants, platforms, or loading stations with, in the case of prices for class 1 milk, a deduction of 1 cent per hundredweight for each 10 miles or part thereof in excess of 70 miles, but not in excess of 100 miles, from the city hall in Chicago, and a further deduction of 1 cent per hundredweight for each 15 miles or part thereof in excess of 100 miles from the city hall in Chicago.

## II. DISTRIBUTORS' SUPPLY CONTRACTS

4. Every distributor shall have contracts or other arrangements for the purchase of milk which in the aggregate shall result in the contracting distributor purchasing daily if tendered under such contracts or other arrangements at class 1 prices a quantity of milk computed as follows:

For each wagon or truck route operated during the years 1929 and 1930 and for each wagon or truck route added thereafter by each "distributor": (a) 382½ pounds per each retail wagon or truck route; (b) 1,050 pounds per each wholesale wagon or truck route.

And in addition, 10 percent of the total of such amounts.

5. All milk delivered in any month shall be paid for not later than the 15th of the following month.

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## EXHIBIT B. RULES FOR CONTROL OF BASIC PRODUCTION

1. For the purposes of this agreement the term "base" as used in respect to any producer, farm, or herd, as the case may be, shall be—

(a) In the case of members of Pure Milk Association, the quantity of milk recorded as such base in the files of Pure Milk Association.

(b) In the case of producers who sell milk within the Chicago metropolitan area and have had no base established by Pure Milk Association, a base shall be allotted by a duly authorized representative of such producers, and bases allotted by such representative shall be equitable as compared with the bases established by Pure Milk

Association for all other products delivering milk in the same Pure Milk Association district.

(c) Producers not now selling milk within the Chicago metropolitan area will be allotted bases (1) in the case of new members of Pure Milk Association by Pure Milk Association, and (2) in the case of nonmembers of Pure Milk Association by a duly authorized representative of such producers, as follows: The base shall be established during the first 90 days in which they produce and market milk within the Chicago metropolitan area and shall be equal to 60 percent of their average daily production during such 90 days.

2. A producer with a base who, as tenant, rents a farm may retain his base; and if he rents a farm for cash, the farm having no base, he is limited to his individual base.

3. A landlord who rents on shares is entitled to the entire base to the exclusion of the tenant if the landlord owns the entire herd on such farm. If cattle are owned jointly, whether in a landlord and tenant relationship or otherwise, the base will be divided between the joint owners according to the ownership of the cattle.

4. The separate bases of any landlord and his tenant or tenants may be handled as a single base.

5. A producer with a base who sells his entire herd to one purchaser at one time may transfer the base to his purchaser, provided that the entire herd is maintained for 6 months consecutively after such sale and transfer on the first farm on which such herd shall have been established.

6. A producer who moves his herd may retain his base only if thereafter milk is produced by him on a farm (1) which has supplied milk for fluid milk in the Chicago metropolitan area within 1 year preceding, or (2) which lies within a territory which has regularly been supplying milk as aforesaid.

7. Where a herd is dispersed for any reason without the base having been transferred with the herd, the producer must replace the herd within 45 days if he is to retain his base.

8. Any producer may combine all bases to which he may be entitled hereunder (for example, a producer with a base who acquires another herd accompanied by

a transfer of the base from the seller may combine the two bases).

9. Any producer who voluntarily ceases to market milk as fluid milk in the Chicago metropolitan area for more than 45 days shall lose his base; and in the event that he resumes production he shall be treated, for the purposes of these rules, as if he were a new producer.

10. A producer whose average daily production for any 3 consecutive months is less than 70 percent of the amount of the base to be sold at class 1 prices (under the present agreement less than 70 percent of 90 percent of base, or, say, less than 63 percent of the total base) will thereby establish a new base equal to such average daily production over such 3-month period.

#### **EXHIBIT C. PRICE SCHEDULE FOR DISTRIBUTORS' SALES**

(a) Sales of the following articles in the Chicago metropolitan area made by distributors shall be at the prices hereinafter in this exhibit set forth. Sales of the following articles in bottles shall be made only in bottles of the sizes specified, and, where a butterfat content is specified, only at the specified percentage.

(b) It shall not be deemed a violation of this license to add to the selling price of any article or articles hereinafter in this exhibit specified any sales or occupational taxes imposed by the laws of any State, if permitted by such laws; but any such additions shall be uniform as to all distributors in accordance with such regulations as the Secretary may prescribe not in conflict with local law.

##### **I. WHOLESALE PRICE SCHEDULE**

##### **II. PRICE SCHEDULE TO STORES**

##### **III. RETAIL PRICE SCHEDULE**

[Price schedules omitted as immaterial.]

#### **EXHIBIT D. SCHEDULE OF FAIR PRACTICES**

The following practices are considered unfair and shall not be engaged in by distributors or by their officers, employees, or agents:

[Schedule of unfair practices omitted.]

**APPENDIX B**

Docket No. 1  
License No. 30

**UNITED STATES DEPARTMENT OF AGRICULTURE  
AGRICULTURAL ADJUSTMENT ADMINISTRATION**

**LICENSE SERIES—LICENSE No. 30**

**AMENDED LICENSE FOR MILK  
CHICAGO, ILLINOIS, SALES AREA  
WITH  
EXHIBIT A**

**ALLOTMENT AND REGULATION OF BASES**

Issued by the Secretary of Agriculture, December 1, 1934. Effective date December 2, 1934 (12:01 a. m. eastern standard time).

**ARTICLE I—PREAMBLE.**

WHEREAS, section 8 of the Agricultural Adjustment Act, as amended, provides as follows:

“Sec. 8. In order to effectuate the declared policy, the Secretary of Agriculture shall have power— \*\*\*

“(3) To issue licenses permitting processors, associations of producers, and others to engage in the handling, in the current of interstate or foreign commerce, of any agricultural commodity or product thereof, or any competing commodity or product thereof. Such licenses shall be subject to such terms and conditions, not in conflict with existing Acts of Congress or regulations pursuant thereto, as may be necessary to eliminate unfair practices or charges that prevent or tend to prevent the effectuation of the declared policy and the restoration of normal eco-

nomic conditions in the marketing of such commodities or products and the financing thereof. • • •

"(4) To require any licensee under this section to furnish such reports as to quantities of agricultural commodities or products thereof bought and sold and the prices thereof, and as to trade practices and charges, and to keep such systems of accounts, as may be necessary for the purpose of part 2 of this title.  
• • •"

and

WHEREAS, the Secretary of Agriculture, acting under the provisions of said Act, for the purposes and within the limitations therein contained, and pursuant to the regulations issued thereunder, has on the 3rd day of February, 1934, issued a License for Milk—Chicago Sales Area; and

WHEREAS, R. G. Tugwell, Acting Secretary of Agriculture, acting under the provisions of said Act, for the purposes and within the limitations therein contained, and pursuant to the regulations issued thereunder, has on the 31st day of May, 1934, issued an Amended License for Milk—Chicago Sales Area; and

WHEREAS, the Secretary of Agriculture, acting under the provisions of said Act; for the purposes and within the limitations therein contained; and pursuant to the regulations issued thereunder, has on the 30th day of June, 1934, issued an Amendment to Amended License for Milk—Chicago Sales Area; and

WHEREAS, the Secretary of Agriculture, acting under the provisions of said Act, for the purposes and within the limitations therein contained, and pursuant to the regulations issued thereunder, has on the 17th day of July, 1934, issued an Amendment to the Amended License for Milk—Chicago Sales Area; and

WHEREAS, R. G. Tugwell, Acting Secretary of Agriculture, acting under the provisions of said Act, for the purposes and within the limitations therein contained, and pursuant to the regulations issued thereunder, has on the 21st day of August, 1934, issued an Amendment to the Amended License for Milk—Chicago Sales Area; and

WHEREAS, M. L. Wilson, Acting Secretary of Agriculture, acting under the provisions of said Act, for the purposes and within the limitations therein contained, and

pursuant to the regulations issued thereunder, has on the 30th day of October, 1934, issued an amendment to the Amended License for Milk—Chicago Sales Area; and

WHEREAS, the undersigned finds that the marketing, distribution and handling of milk and the products thereof, covered by this License, are in the current of interstate commerce since the portion thereof which occurs within the bounds of a single State affects and actually and potentially competes with the marketing, distribution and handling of commodities and products which occur between or among several States, and since the commodity, and the products thereof, covered by this License cannot be separated into interstate and intrastate portions, the supply and the marketing, distribution and handling thereof being inextricably commingled, so that it is impossible to regulate the interstate marketing, distribution and handling without also regulating the intrastate marketing, distribution and handling, and the failure to regulate the latter will defeat and obstruct the purposes of the Act with respect to the former; and

WHEREAS, the undersigned has determined to modify the terms and conditions of the said Amended License for Milk—Chicago Sales Area, pursuant to section 8 (3) of the Agricultural Adjustment Act, as amended, and applicable General Regulations of the Agricultural Adjustment Administration; and

WHEREAS, the undersigned finds that this Amended License and the terms and conditions hereof are in accordance with the provisions of section 8 (3) of the said Act and tend to effectuate the purposes of the Act; and

WHEREAS, the undersigned finds that the subject matter of this Amended License is embraced within the scope of a hearing heretofore held on a Marketing Agreement pursuant to applicable General Regulations of the Agricultural Adjustment Administration:

Now, THEREFORE, the undersigned, acting under the authority vested in him as aforesaid;

Hereby amends and modifies the terms and conditions of the said License and hereby licenses each and every distributor to engage in the business of marketing, distributing or handing milk or cream as a distributor in the Chicago Sales Area, subject to the terms and condi-

tions set forth in this Amended License, hereinafter called the "License."

#### ARTICLE II—DEFINITIONS.

Section 1. *Definitions of Terms.* As used in this License, the following words and phrases shall be defined as follows:

1. "Act" means the Agricultural Adjustment Act approved May 12, 1933; as amended.

2. "Secretary" means the Secretary of Agriculture of the United States.

3. "Chicago Sales Area," hereinafter called the "Sales Area," means and includes the city of Chicago and all of that territory lying within the boundaries of Cook County, Lake County and DuPage County, State of Illinois; the townships of Dundee, Elgin, St. Charles, Geneva, Batavia and Aurora, in Kane County, State of Illinois; the township of Oswego in Kendall County, State of Illinois; the townships of Wheatland, DuPage, Plainfield, Lockport, Homer, Troy, Joliet, New Lenox, Frankfort and Crete in Will County, State of Illinois; and the townships of St. John, Ross, North, Calumet, and Hobart in Lake County, State of Indiana.

4. "Person" means any individual, partnership, corporation, association or other business unit.

5. "Producer" means any person, irrespective of whether any such person is also a distributor, who produces milk in conformity with the applicable health requirements in force and effect within the Sales Area for milk to be sold for consumption as whole milk or cream in the Sales Area.

6. "New Producer" means (1) a producer whose milk was neither being purchased by distributors nor being distributed in the Sales Area within ninety (90) days prior to the effective date of this License, or (2) a producer who has ceased to market milk pursuant to the terms and provisions of this License for a period of forty-five (45) consecutive days or more, and thereafter markets milk pursuant to the terms and provisions of this License.

7. "Distributor" means any of the following persons, irrespective of whether any of such persons is a producer

or an association of producers), wherever located or operating, whether within or without the Sales Area, engaged in the business of distributing, marketing, or in any manner handling whole milk or cream, in whole or in part for ultimate consumption in the Sales Area:

- (a) who pasteurize, bottle or process milk or cream;
- (b) who distribute milk or cream at wholesale or retail to (1) hotels, restaurants, stores or other establishments for consumption on the premises; (2) stores or other establishments for resale; and (3) consumers;
- (c) who operate stores or other establishments selling milk or cream at retail for consumption off the premises;
- (d) who purchase, market or handle milk or cream which is sold for resale in the Sales Area.

8. "Subsidiary" means any person of, or over whom or which, a distributor or an affiliate of a distributor has or several distributors collectively have, either directly or indirectly, actual or legal control, whether by stock ownership or in any other manner.

9. "Affiliate" means any person and/or any subsidiary thereof, who or which has, either directly or indirectly actual or legal control of or over a distributor, whether by stock ownership or in any other manner.

10. "Books and records" means books, records, account contracts, memoranda, documents, papers, correspondence or other data pertaining to the business of the person in question.

11. "Market Administrator" means the person designated pursuant to article III.

12. "Delivery period" means the period from the first to, and including, the last day of each month.

13. "Established base," for each producer, including new producers, means that quantity of milk allotted to such producer in accordance with the provisions of exhibit A which is attached hereto and made a part hereof.

14. "Class I percentage" means such a percentage of the total established bases as the Market Administrator shall determine at intervals of once for every three months, by dividing the average monthly sales of Class

milk for the preceding three months by the total established bases of the market. The Market Administrator may increase or reduce this percentage sufficiently to allow for minor variations in Class I milk.

15. "Class II percentage" means such a percentage of the total established bases as the Market Administrator shall determine at intervals of once for every three months by dividing the average monthly sales of Class II milk for the preceding three months by the total established bases of the market. The Market Administrator may increase or reduce this percentage sufficiently to allow for minor variations in Class II milk.

16. "Class I percentage base" means for each producer, including new producers, the established base of that producer multiplied by the Class I percentage.

17. "Class II percentage base" means for each producer, including new producers, the established base of that producer multiplied by the Class II percentage.

18. "Delivered Class I percentage base" means for each producer, including new producers, that quantity of milk delivered by such producer to distributors which is not in excess of the Class I percentage base of such producer.

19. "Delivered Class II percentage base" means for each producer, including new producers, that quantity of milk delivered by such producer to distributors which is in excess of such producer's Class I percentage base but which is not in excess of the combined Class I and Class II percentage bases of such producer.

### ARTICLE III—MARKET ADMINISTRATOR.

[Sections concerning duties and rights of Market Administrator not copied.]

### ARTICLE IV—CLASSIFICATION OF MILK SALES AND USES.

Section 1. *Primary Sales and Uses.* Milk purchased or handled by distributors shall be classified according to its sale and use as follows:

1. Class I milk means all milk sold or distributed by distributors as whole milk for consumption or use in the Sales Area.

2. Class II milk means all milk used by distributors to produce cream for sale or distribution by distributors as cream for consumption or use in the Sales Area.

3. Class III milk means that quantity of milk or milk equivalent:

- (a) used by distributors to produce ice cream, ice cream mix, condensed or evaporated milk.
- (b) sold by distributors to produce ice cream or ice cream mix.

4. Class IV milk means the quantity of milk purchased, sold, used or distributed by distributors in excess of Class I, Class II and Class III milk.

*Sec. 2. Classification of Sales to Other Distributors.* Milk sold or distributed as milk or cream to another distributor, whether within or without the Sales Area, shall be accounted for by such selling distributor according to the class in which such milk or cream is sold or used by the purchasing distributor. Any distributor purchasing milk and/or cream from another distributor shall, on or before the date fixed for filing reports with the Market Administrator pursuant to article VI, furnish to the distributor from whom he purchased such milk and/or cream, an affidavit as to the quantity of milk and/or cream sold, used or distributed in each of the classes defined in section 1 of this article.

*Sec. 3. Sales Outside the Sales Area.* Milk sold or distributed by a distributor as milk or cream outside the Sales Area, shall be accounted for by such selling distributor as Class I and Class II milk, respectively: *Provided*, That if such selling distributor, on or before the date fixed for filing reports pursuant to article VI, shall furnish to the Market Administrator satisfactory proof that such milk or cream has been utilized for a purpose other than the sale or distribution for ultimate consumption or use as milk or cream, then, and in that event such milk or cream shall be classified in accordance with such other use.

*\*Sec. 4. Limitation as to Purchases from Producers without Bases.* No distributor shall purchase milk or

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\* As amended by Amendment to Amended License issued by the Secretary of Agriculture on January 16, 1935, effective January 17, 1935.

cream, for Class I or Class II purposes, produced by producers without bases, unless sufficient milk to meet all his Class I requirements, and sufficient milk or cream to meet his Class II requirements up to a quantity of milk or milk equivalent equal to 25 per cent of his Class I milk, is not tendered by producers with bases or by distributors purchasing only from producers with bases.

#### **ARTICLE V—PRICES TO DISTRIBUTORS AND CONDITIONS OF SALES.**

**Section 1. *Prices.*** Each distributor, except as herein-after provided, shall be obligated to pay, in the manner hereinafter set forth in this License, the following prices for milk, of 3.5 per cent butterfat content, which he has purchased from producers (including new producers), delivered f.o.b. distributor's country plant, platform, or loading station:

- \*\*1. Class I milk—\$2.00 per hundredweight.
- 2. Class II milk—For each one hundred pounds of milk —to the average price per pound of 92 score butter at wholesale in the Chicago market, as reported daily by the United States Department of Agriculture for the delivery period during which such milk is purchased, add 10 cents per pound, then multiply by 3.5.
- 3. Class III milk—For each one hundred pounds of milk —to the average price per pound of 92 score butter at wholesale in the Chicago market, as reported by the United States Department of Agriculture for the delivery period during which such milk is purchased, add 8 cents per pound, then multiply by 3.5.
- 4. Class IV milk—For each one hundred pounds of milk —3.5 times the average price per pound of 92 score butter at wholesale in the Chicago market as reported daily by the United States Department of Agriculture, for the delivery

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\*\* Increased to \$2.20 per hundredweight by Amendment to Amended License effective January 17, 1935.

period during which such milk is purchased, to which amount shall be added 4 cents.

*Sec. 2. Adjustments in Cost of Milk to Distributors.* The prices set forth in section 1 of this article shall be subject to adjustment in accordance with the following:

1. If any producer has delivered milk to a distributor at a country plant, platform, or loading station located more than 70 miles from the City Hall in Chicago, there shall be a deduction with respect to his Class I milk of 1 cent per hundredweight for each 10 miles or part thereof in excess of 70 miles, but not in excess of 100 miles from the City Hall in Chicago, and 1 cent per hundredweight for each 15 miles or part thereof in excess of 100 miles from the City Hall in Chicago.

2. Unless the prior written consent of the Market Administrator is obtained to compute the adjustments in the cost of milk to distributors made pursuant to this section, on some other basis, such adjustments shall be computed on the basis that to the extent necessary to supply each distributor with milk sold, distributed or used by him as Class I milk, the milk which was delivered to him at locations in or nearest to the Sales Area was sold, distributed or used by him as Class I milk.

3. On Class I, Class II and Class III milk sold, distributed or used outside of the Sales Area, there shall be an adjustment by (1) the amount of the difference between the Class I, Class II and Class III prices, respectively, specified in section 1, and such prices as the Market Administrator may determine to be the market prices in the market where such milk or cream is sold, distributed or used, and (2) the reasonable cost of transportation from the plant of origin of such milk or cream to such market.

*Sec. 3. Other Licenses for Milk.* If any milk is purchased from producers pursuant to the terms and conditions of this License and sold as milk or cream for ultimate consumption in another market with respect to which a License is in effect pursuant to section 8 (3) of the Act covering such purchase from producers and such sales as milk or cream; then, and in that event the License in effect in the area in which such milk or cream is sold for ultimate consumption shall govern the prices and conditions of such sale.

**Sec. 4. Transaction with Violators.** No distributor shall purchase milk or cream from, or process or distribute milk or cream for, or sell milk or cream to any other distributor who he has notice is violating any provision of this License. Notice in writing from the Market Administrator shall be deemed to be sufficient notice.

**Sec. 5. Purchases by Distributors from Other Distributors.** No distributor shall sell milk or cream to or purchase milk or cream from another distributor for Class I or Class II purposes at less than the respective Class I or Class II prices specified in section 1, subject to adjustments as provided in section 2. If the selling distributor pasteurizes, bottles, or otherwise processes or transports such milk or cream as a service to the buying distributor, a reasonable charge or payment, as the case may be, shall be made therefor.

**Sec. 6. Prior Contracts.** Any contract or agreement entered into by a distributor prior to the effective date of this License, covering the purchase, delivery and/or sale of milk and its products, shall be deemed to be superseded by the terms and provisions of this License in so far as such contract or agreement is inconsistent with any provision of this License.

## ARTICLE VI—REPORTS OF RECEIPTS AND SALES OF MILK BY DISTRIBUTORS.

**Section 1.** On or before the 7th day after the end of each delivery period, each distributor (other than those who operate only stores or similar establishments) shall report to the Market Administrator in a manner prescribed by the Market Administrator, with respect to milk or cream received by such distributor, during such delivery period, as follows:

1. The deliveries to each plant from producers supplying such distributor, the total quantity of milk represented by the delivered Class I percentage bases of all such producers, the total quantity of milk represented by the delivered Class II percentage bases of all such producers, and the total quantity of milk represented by the excesses over the delivered Class I and Class II percentage bases of all such producers; and the deliveries of new producers supplying such distributor.

2. The total quantities of milk which were sold, used, or distributed by such distributor as Class I, Class II, Class III and Class IV milk, respectively, including sales to other distributors.

3. The deliveries of milk made to such distributor by any other distributor.

4. Upon first receiving milk from any producer (1) the name of such producer, (2) the date on which such milk was first received, and (3) whether or not such producer is a new producer.

5. Such other information as the Market Administrator may request for the purpose of performing the provisions of this License.

#### **ARTICLE VII—DISTRIBUTORS NOT MARKETING WHOLE MILK.**

**Section 1. *Distributors Not Marketing Whole Milk.*** Any distributor who does not sell or distribute whole milk for ultimate consumption or use in the Sales Area, and who does not purchase milk from producers with bases:

1. Shall pay to producers the Class II price set forth in section 1 of article V for the milk purchased by him which is used to produce cream sold or distributed by him for ultimate consumption in the Sales Area;

2. Shall not be subject to the terms and provisions of articles VIII, IX, X, XII and XIII; but shall submit any or all reports pursuant to article VI upon the request of the Market Administrator.

#### **ARTICLE VIII—DETERMINATION AND NOTIFICATION OF PRICES TO PRODUCERS.**

**Section 1. *Computations.*** With respect to each delivery period, the Market Administrator shall:

1. Compute the total value of the milk reported by each and all distributors pursuant to article VI on the basis of the classification and prices with adjustments as set forth in articles IV and V, respectively, which computations shall not include the milk or the value thereof as purchased by distributors from other distributors, or if classified as emergency milk pursuant to section 3 of article IX.

2. Compute the total adjusted value of all the milk,

the total value of which is computed in paragraph 1, by adding to such total value the adjustments to be made pursuant to section 5 of article IX.

3. Compute the total quantities of milk which represent, respectively, (1) the total of delivered Class I percentage bases, (2) the total of delivered Class II percentage bases and, (3) the total deliveries in excess of the delivered Class I and Class II percentage bases, all of which quantities are included in the computations made pursuant to paragraph 1.

4. Compute the value of the quantity of milk represented by the total Class I delivered percentage bases by multiplying such quantity of milk by the price specified for Class I milk in section 1 of article V.

5. Compute the value of the quantity of milk delivered in excess of the total delivered Class I and Class II percentage bases by multiplying such quantity of milk by the price specified for Class IV milk in section 1 of article V.

6. Compute the total value of the quantity of milk represented by the total delivered Class II percentage bases by subtracting from the amount obtained in paragraph 2, the amounts obtained in paragraphs 4 and 5.

7. Compute the blended price per hundredweight for the quantity of milk represented by the delivered Class II percentage bases by dividing the amount obtained in paragraph 6 by the quantity of milk represented by the total delivered Class II percentage bases, which blended price shall be subject to adjustments as set forth in section 2 of this article.

*Sec. 2. Adjustments for Reserves.* The Market Administrator may adjust the blended price, computed pursuant to section 1 of this article, for the purpose of establishing and maintaining a reserve fund against (1) the failure or delay of distributors to make payments on equalization accounts pursuant to section 2 of article X, (2) errors and discrepancies in reports of distributors, and (3) errors and discrepancies in equalization accounts, including adjustments on delayed reports of distributors: *Provided*, That such adjustments in the blended price for any one delivery period may not, except upon the specific approval of the Secretary, exceed an amount equal to two (2) per cent of the total value of milk reported by distributors for

such delivery period. Such reserve fund shall at no time contain a net amount in excess of ten (10) per cent of the value of the milk reported by distributors for an average delivery period and shall in no event be used by the Market Administrator to meet any costs or liabilities incurred by him under this License. If and when all or any portion of said reserve fund is not necessary to accomplish the purpose for which it was created, equitable distribution thereof shall be made by the Market Administrator to the producers supplying milk for distribution in the Sales Area.

Sec. 3. *Notification of Prices.* On or before the 12th day after the end of each delivery period, the Market Administrator shall notify all distributors, whose reports are included in the computations made pursuant to section 1 of this article, of the blended price computed pursuant to section 1 of this article, as adjusted pursuant to section 2 of this article, and of the Class II, Class III and Class IV prices as calculated by him pursuant to formulae set forth in section 1 of article V.

#### ARTICLE IX—PAYMENTS TO PRODUCERS.

Section 1. *Payments to Producers and New Producers.* Each distributor shall pay to producers (including new producers) on or before the 18th day after the end of each delivery period for milk delivered by such producers during such delivery period subject to adjustments as set forth in this article and deductions as set forth in article XII:

1. The Class I price for the quantity of milk delivered by each producer represented by such producer's delivered Class I percentage base.
2. The adjusted blended price, announced pursuant to section 3 of article VIII, for the quantity of milk delivered by each producer represented by such producer's delivered Class II percentage base.
3. The Class IV price for the quantity of milk delivered by each producer in excess of such producer's delivered Class I and Class II percentage bases.

Sec. 2. *Additional Payments.* Any distributor may, with the prior approval of the Market Administrator,

make payments to producers in addition to the payments pursuant to section 1 of this article: *Provided*, That such additional payments are made to all the producers supplying such distributor with milk of similar quality and grade. No distributor may accept services from or render services to a producer or an association of producers from whom he is purchasing milk without making a reasonable payment or charge, as the case may be, for such services.

**Sec. 3. Emergency Milk.** During any emergency period when the normal supply of milk from producers is not sufficient to meet the Class I and Class II requirements of any distributor, such distributor may, with the prior approval of the Market Administrator, purchase milk for such emergency purposes from producers on terms and conditions other than those set forth in this article and in article XII, but at prices not less than the equivalent of the prices set forth in article V, in which event such milk shall not be included in the computations as provided in article VIII, but shall be reported separately to the Market Administrator by such distributor.

**Sec. 4. Butterfat Differentials.** Each distributor shall pay an amount per hundredweight of milk for each 1/10th of one per cent butterfat content above, and shall deduct a similar amount for each 1/10th of one per cent butterfat content below 3.5 per cent butterfat on all milk on which prices are paid producers pursuant to sections 1 and 2 of this article, as follows:

1. On delivered Class I and Class II percentage bases, four (4) cents per hundredweight; and
2. On all milk delivered in excess of delivered Class I and Class II percentage bases, an amount per hundredweight equal to 1/10th of the average price per pound of 92 score butter at wholesale in the Chicago market as reported by the United States Department of Agriculture for the delivery period during which such milk is purchased.

**Sec. 5. Location Adjustments in Payments to Producers.** With respect to the delivered Class I percentage base of any producer who has delivered milk to a distributor at a country plant, platform or loading station located more than 70 miles from the City Hall in Chicago, each distributor shall deduct from payments to producers to be made pursuant to section 1 of this article, one (1) cent per

hundredweight for each ten (10) miles or part thereof in excess of seventy (70) miles, but not in excess of one hundred (100) miles from the City Hall in Chicago; and one (1) cent per hundredweight for each fifteen (15) miles or part thereof in excess of one hundred (100) miles from the City Hall in Chicago.

Sec. 6. *Distributors' Reports of Payments.* On or before the 20th day after the end of each delivery period, each distributor shall report for such delivery period to the Market Administrator, in a manner prescribed by him, with respect to each producer: (1) his name, (2) his total deliveries of milk as delivered Class I percentage base, delivered Class II percentage base, and excess, respectively, (3) the average butterfat content of milk delivered, (4) the total payment made to such producer, showing all adjustments, additions and deductions, and (5) such other similar information as the Market Administrator shall request.

#### ARTICLE X—EQUALIZATION AMONG DISTRIBUTORS AS TO PAYMENTS TO PRODUCERS.

Section 1. *Equalization Accounts.* The Market Administrator shall maintain for each distributor whose reports are included in the computations made pursuant to article VIII, records and accounts which shall accurately disclose for each distributor (1) a debit of the total value of milk as computed for each distributor pursuant to paragraph 1, section 1 of article VIII, (2) a credit of the total payments to be made by such distributor pursuant to section 1 of article IX, after giving effect to the adjustments pursuant to section 5 of article IX, and (3) the payments to be made by such distributor to the Market Administrator and payments to be made by the Market Administrator to such distributor.

Sec. 2. *Statement to Distributors and Payment of Balances.* On or before the 14th day after the end of each delivery period the Market Administrator shall render a statement to each distributor whose reports are included in the computations made pursuant to article VIII, showing the debit or credit balance, as the case may be, in the equalization account of such distributor with respect to milk purchased, sold or used during such delivery period. Debit balances shall be paid to the Market Administrator on or

before the 16th day after the end of such delivery period. Any funds so paid to the Market Administrator shall, as soon as reasonably possible be paid out by him pro rata among the distributors having credit balances in proportion to, but only to the extent of, each such credit balance.

#### ARTICLE XI—PRODUCERS AND PRODUCERS' COOPERATIVE ASSOCIATIONS.

**Section 1. *Payments by Cooperatives.*** No provision in this License shall be construed as controlling or restricting any producers' cooperative association which meets the requirements of the Capper-Volstead Act and is licensed as a distributor under this License, with respect to the actual deductions or charges, dividends or premiums to be made by such association from and/or to its members: *Provided,* That no such deductions or charges may be made by any such producers' cooperative association from any of its members, to meet a current operating loss incurred by such producers' cooperative association in its processing or distribution operations unless (a) expressly and specifically authorized by any such member to make such deductions or charges for such purpose, and (b) the producers' cooperative association notifies the Market Administrator of the same.

**Sec. 2. *Transportation Rights.*** Producers shall have the right to deliver milk to plants or platforms of distributors, using any reasonable method of transportation which they, in their discretion, may select. No distributor shall interfere with or discriminate against producers in the exercise of such right. At the request of the Market Administrator, each distributor shall from time to time, submit a verified report stating the actual transportation charges on all milk delivered to him f.o.b. any and all plants, for the purpose of permitting the Market Administrator to review such transportation charges and to determine the reasonableness thereof.

#### ARTICLE XII—DEDUCTIONS FROM PAYMENTS TO PRODUCERS.

**Section 1. *For Market Administration.*** Each distributor shall deduct one (1) cent per hundredweight from the payments to be made by him pursuant to article IX in regard to all milk delivered to him during each delivery

period by producers and shall on or before the 18th day after the end of each such delivery period, pay such deduction to the Market Administrator.

**Sec. 2. For Marketing Services.** Upon the request of the Market Administrator each distributor shall, in addition, deduct three (3) cents per hundredweight from the payments to be made by such distributor pursuant to article IX in regard to all milk delivered to him during each delivery period by producers (1) for whom the following services are not currently rendered in a satisfactory manner by a producers' cooperative association: (a) market information, (b) supervision over weights and tests, and (c) to the extent that funds permit, the establishment and maintenance of a reserve fund for the protection against the failure of distributors to make payments for milk purchased; and (2) from whom a substantially similar charge or deduction is not being paid by distributors to a producers' cooperative association for such purposes. Such deductions shall be paid to the Market Administrator on or before the 18th day after the end of each delivery period and shall be expended by him for the purpose of securing services similar to those above named for producers from whose payments such deductions are made except that with the approval of the Secretary, the Market Administrator may notify any producer when the distributor to whom such producer is selling milk is in violation of any of the terms and provisions of this License, and no producer shall be entitled to protection against the failure of such distributor to make payments for milk purchased from such producer thereafter and until otherwise notified by the Market Administrator. All deductions made pursuant to this section shall be kept in a separate account by the Market Administrator and shall in no event be used by him to meet any costs or liabilities incurred by him under this License, except as provided in this section.

**See. 3. Agents of Market Administrator.** The Market Administrator may, in his discretion, employ the facilities and services of any agent or agents for the purpose of securing to producers the aforementioned benefits, if such benefits may be efficiently and economically secured thereby. The Market Administrator shall pay over such funds to such agent or agents, if he determines to do so, only upon the consent of such agent or agents to (1) keep its or their

books and records in a manner satisfactory to the Market Administrator; (2) permit the Market Administrator to examine its or their books and records, and to furnish the Market Administrator such verified reports or other information as the Market Administrator may from time to time request; and (3) disburse such funds in the manner above provided.

Sec. 4. *Waiver of Deductions.* The Market Administrator, in his discretion, may at any time waive the foregoing deductions or distribute any balance arising from such deductions, or any part thereof, for any delivery period (in which event the deductions so waived shall not be made by the distributors from payments to producers); the distribution of any such balances shall be equitable (1) among all producers with respect to the amounts paid to the Market Administrator pursuant to section 1 of this article, and (2) among all producers from whom such deductions have been made pursuant to section 2 of this article.

#### ARTICLE XIII—DISTRIBUTOR'S FINANCIAL RESPONSIBILITY.

[Sections as to Financial Responsibility not copied.]

#### ARTICLE XIV—MILK INDUSTRY BOARD.

[Sections as to Milk Industry Board not copied.]

#### ARTICLE XV—GENERAL PROVISIONS.

Section 1. *Books and Records.* The distributors and their respective affiliates and subsidiaries shall severally keep books and records which will clearly reflect all the financial transactions of their respective businesses and the financial condition thereof.

Sec. 2. *Reports.* The distributors shall severally, from time to time, upon the request of the Secretary, furnish him with such information as he may request, in a manner prescribed by him and/or in accordance with forms of reports to be supplied by him, for the purposes of (1) assisting the Secretary in the furtherance of his powers and duties with respect to this License and/or (2) enabling the Secretary to ascertain and determine the extent to

which the declared policy of the Act and the purpose of this License are being effectuated; such reports to be verified under oath. The Secretary's determination as to the necessity of and the justification for the making of any such reports, and the information called for thereby, shall be final and conclusive.

**Sec. 3. *Examination of Books and Records.*** For the same purposes as set forth in section 2 of this article and/or to enable the Secretary to verify information furnished him, all the books and records of each distributor and the books and records of the affiliates and subsidiaries of each distributor, shall, during the usual hours of business, be subject to examination by the Secretary. The Secretary's determination as to the necessity of and the justification for any such examination shall be final and conclusive.

**Sec. 4. *Confidential Information.*** To the extent not otherwise expressly provided by this License, all information in the possession of the Secretary, the Market Administrator, their agents, or any official, which relates to the business or property of any person and which was furnished by or obtained from such person pursuant to the requirements of this License, shall be kept confidential in accordance with the applicable General Regulations of the Agricultural Adjustment Administration.

**Sec. 5. *Agents.*** The Secretary may by designation in writing, name any person or persons, including officers or employees of the Government, or Bureaus or Divisions of the Department of Agriculture, to act as his agents or agencies in connection with any of the provisions of this License, and he may authorize any such agent or agency to designate or appoint persons, including officers or employees of the Department of Agriculture, to exercise or perform any or all of the powers and functions delegated to them as may be deemed necessary or advisable to accomplish the proper execution or performance of such powers and functions.

**Sec. 6. *Separability.*** If the applicability of any provision of this License to any person, circumstance or thing is held invalid, the applicability thereof to any other person, circumstance or thing, shall not be affected thereby. If any provision of this License is declared invalid, the validity

of the remainder of this License shall not be affected thereby.

Sec. 7. *Derogation.* Nothing contained in this License is or shall be construed to be in derogation or modification of the rights of the Secretary, or of the United States (1) to exercise any powers granted by the Act or otherwise, and/or (2) in accordance with such powers, to act in the premises whenever such action is deemed advisable:

Sec. 8. *Termination.* In the event this License is terminated or amended by the Secretary, any and all obligations which shall have arisen, or which may thereafter arise in connection therewith, by virtue of or pursuant to this License, and any violations of this License which may have occurred prior to such termination or amendment, shall be deemed not to be affected, waived or terminated by reason thereof, unless so expressly provided in the notice of termination of, or the amendment to this License.

Sec. 9. *Period of Notice.* The Secretary hereby determines that an emergency exists which requires a shorter period of notice than three days, and that the period of notice, with respect to the issuance of this License, which is hereinafter provided, is reasonable under the circumstances.

*In witness whereof,* H. A. Wallace, Secretary of Agriculture, acting under the provisions of the Agricultural Adjustment Act, as amended, and pursuant to the applicable General Regulations of the Agricultural Adjustment Administration, does hereby execute in duplicate and issue this Amended License in the City of Washington, District of Columbia, on this 1st day of Dec., 1934, and pursuant to the provisions hereof, declares this License to be effective on and after 12:01 a.m., eastern standard time, Dec. 2, 1934.

H. A. WALLACE,  
*Secretary of Agriculture.*

## EXHIBIT A

## ALLOTMENT AND REGULATION OF BASES.

Section 1. *Allotment of Bases.* For the purposes of this License, each producer shall be allotted a base as follows:

1. In the case of producers (excepting new producers) who are members of the Pure Milk Association, herein-after called the "Association," the bases recorded in the files and records of the Association shall be the bases of such producers. The Market Administrator shall have access to such files and records.

2. In the case of producers who are not members of the Association, bases shall be allotted by the Market Administrator, which bases shall be equitable as compared with the bases of producers who are members of the Association.

3. In the case of producers who have been delivering milk in the Sales Area prior to 90 days before the effective date of this License, but for whom bases have not already been allotted pursuant to paragraphs 1 and 2, bases shall be allotted by the Market Administrator equal to 90 per cent of such producer's average deliveries of milk during the first three months, excepting May and June, for which records of such producer's deliveries are requested by and reported to the Market Administrator.

4. In the case of each new producer, a base shall be allotted by the Market Administrator which shall be equal to 80 per cent of the total delivery of milk by such new producer for each of the first three months, excepting May and June, during which such new producer delivers milk to distributors. For any part of May or June falling within such three months, the base for each new producer shall be equal to 60 per cent of his total delivery of milk. After such new producer has delivered milk to distributors for three months, he shall be allotted a base by the Market Administrator equal to the average of his base during such three months.

Sec. 2. *Revision of Bases.* The Market Administrator may make such revisions in the bases of producers who are not members of the Pure Milk Association as he may

from time to time, deem necessary or advisable, to the end that such bases may be equitable as among producers.

Sec. 3. *Reports by Distributors.* Upon the request of the Market Administrator, each distributor, who has not already submitted reports containing the information required in this paragraph, shall, within ten days after receiving such request, submit to the Market Administrator written reports, verified under oath, containing the following information with respect to each producer, who has delivered milk to such distributor; for each calendar month during the years 1933 and 1934 or such portion thereof as the producer may have delivered milk, (1) the total pounds of delivered milk, (2) the number of days in each month upon which deliveries were made.

Sec. 4. *Announcement of Bases.* When bases are established for producers pursuant to paragraphs 2, 3, and 4 of section 1, or revised pursuant to section 2 of this exhibit, the Market Administrator shall notify each distributor of the bases of such producers who are delivering milk to each such distributor.

Sec. 5. *Tenure and Transfer of Bases.* The following rules shall govern the tenure and transfer by producers of all bases allotted pursuant to this exhibit:

1. Any producer who voluntarily ceases to market milk pursuant to the terms and provisions of this License for a period of more than forty-five (45) consecutive days shall forfeit his base.

2. Because of the lack of feed resulting from the severe drought in the Chicago production area, any producer may upon notice to the Market Administrator, discontinue the deliveries of milk to distributors in the Sales Area at any time after the effective date of this License and retain his base notwithstanding the provision in paragraph 1, provided that such producer's base be not transferred to another person, and that he resumes such deliveries on or before June 1, 1935.

3. A base may be transferred to another person upon the sale and transfer of the producer's entire herd to such person: *Provided, however,* That such base so transferred shall be forfeited unless the entire herd is maintained for six months consecutively after such sale and

transfer. Such transfer shall be reported to the Market Administrator.

4. A producer with a base, whether landlord or tenant, may retain his base when moving his entire herd from one farm to another farm.

5. A landlord who rents on shares is entitled to the entire base to the exclusion of the tenant, if the landlord owns the entire herd. Likewise, the tenant who rents on shares is entitled to the entire base to the exclusion of the landlord if the tenant owns the entire herd. If the cattle are jointly owned by tenant and landlord, the base shall be divided between the joint owners according to the ownership of the cattle if and when such joint owners terminate the tenant-landlord relationship.

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CHARLES ELMORE GROPLEY  
CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, A. D. 1939

No. 397

UNITED STATES OF AMERICA,

*Appellant,*

*vs.*

THE BORDEN COMPANY, et al.,

*Appellees.*

APPEAL FROM THE DISTRICT COURT OF THE  
UNITED STATES FOR THE NORTHERN DISTRICT  
OF ILLINOIS, EASTERN DIVISION.

BRIEF FOR ROBERT G. FITCHIE, JAMES G. KENNEDY,  
STEVE C. SUMNER, FRED DAHMS, F. RAY BRYANT,  
JOHN O'CONNOR, AND DAVID A. RISKIND, CERTAIN  
APPELLEES.

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DAVID A. RISKIND,

ABRAHAM W. BRUSSELL,

*Of Counsel.*

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RAY BRYANT, JOHN O'CONNOR, AND DAVID H.  
RISKIND, CERTAIN APPELLEES.

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To the Honorable Chief Justice and Associate Justices  
of the Supreme Court of the United States:

This brief is on behalf of Robert G. Fitchie, James G. Kennedy, Steve C. Sumner, Fred Dahms, F. Ray Bryant, John O'Connor and David A. Riskind, appellees in this Court, defendants in the trial court. We shall refer to them as defendants.

All defendants except Riskind were officials of the Milk Wagon Drivers' Union, Local 753, International Brotherhood of Teamsters, Chauffeurs, Stablemen and Helpers of America, an affiliate of the American Federation of Labor, a voluntary unincorporated association of individuals (R. 9-10, Paragraphs 39 and 40). David A. Riskind was attorney for said union.

In this brief the aforesaid defendants contend on behalf of "the" union as they did in the court below, that there could be no indictment of the union.

For purposes of convenience we shall refer to the aforesaid Milk Wagon Drivers' Union, Local 753, etc., as the "defendant union", and to the aforesaid individual defendants as "union officials".

#### **Questions in Common.**

On this appeal there are certain "common" questions of law that are being urged by the various other defendants before this court on this appeal. To avoid unnecessary repetition, we shall not repeat these arguments but instead respectfully refer this court to the other briefs filed on behalf of the other defendants, raising these common questions of law. By this means we seek to avail ourselves of these common questions of law raised by the other briefs. In this brief we shall urge *only* such questions of law that are unique or peculiar to the defendants on whose behalf this brief is filed.

#### **The Indictment Concerning Defendants.**

The indictment charges that defendant union is a voluntary unincorporated Association of individuals in Chicago, Illinois. Individual members of the union are employed by distributors (R. 2) in Chicago in connection with sale

and distribution of fluid milk in Chicago. The union had a membership in excess of 5,000 members of which about 75% were employed by the major distributors (R. 2). The individual defendants with their official capacity or position with the union are listed (R. 9-10, Pars. 39-40).

Count I charges a conspiracy by *all* defendants in violation of the Sherman Act to fix prices to be paid by all distributors to all producers for all fluid milk produced in the various foreign states on approved dairy farms, which milk so produced was later shipped from those states into the City of Chicago (R. 11). Under Count I, the union and the union officials were charged with the following overt acts "pursuant to and in execution of the conspiracy":

- (1) To restrain and impede transportation of fluid milk into the City of Chicago shipped to certain independent distributors.
- (2) To restrain and impede distribution within the City of Chicago of fluid milk by certain independent distributors.
- (3) By denying membership in Local 753 to duly qualified drivers in the employ of certain independent distributors (R. 14).

Count II charged a conspiracy by all defendants in violation of the Sherman Act to fix prices for the sale by the distributors in the City of Chicago of fluid milk shipped into Chicago from various foreign (R. 17) states. Under Count II the union, and the union officials were charged with the commission of overt acts in execution of this conspiracy identical with the three acts alleged with regard to Count I stated *supra*, and a fourth overt act so charged was that of compelling independent distributors to sell fluid milk at fixed prices (R. 19).

County IV charged a conspiracy by all defendants in violation of the Sherman Act to restrain and obstruct the supply of moving milk moving in the channels of interstate commerce into the City of Chicago from the various foreign states (R. 25). The overt acts charged against the union and the union officials to accomplish this conspiracy were:

- (1) To resort to threats, acts of violence or other coercive means against certain independent distributors;
- (2) To deny membership in Local 753 to duly qualified drivers in the employ of certain independent distributors;
- (3) To prevent, hinder and restrain transportation and delivery of fluid milk into the City of Chicago to independent distributors (R. 28).

(Count III is not involved in this appeal. The Government's brief so admits by not assigning error on the trial court's ruling in sustaining the demurrer as to Count III. In addition this Court has so ruled).

## OUTLINE OF ARGUMENT.

### I.

The Sherman Anti-Trust Act of 1890 does not apply to labor unions or labor union activities, and the defendant union and the defendant union officials cannot be prosecuted under the Anti-Trust Act of 1890.

A. The true congressional intent of the Sherman Act was to apply this Anti-Trust law only to business combinations and not to apply the Anti-Trust law to labor unions and their activities.

B. This Court should adopt the true congressional intent of the Sherman Anti-Trust law and should overrule its prior decision in *Loewe v. Lawlor*.

C. Detailed Evidence of Legislative History of the Sherman Act.

### II.

By the passage of Section 6 of the Clayton Act of 1914, Congress intended to overrule this Court's decision in *Loewe v. Lawlor*.

A. The true Congressional intent of Section 6 of the Clayton Act was to adopt and make clear beyond all doubt the original intention of the Sherman Act of 1890 to apply only to business combinations and not to labor combinations.

B. This court should overrule its prior decision in *Duplex Press v. Deering*, which disregarded the Congressional intent of Section 6 of the Clayton Act.

## III.

Recent Federal legislation indicates congressional recognition of the same economic differences between labor and capital that impelled the Federal Congress to exclude labor unions and their activities from the Federal Anti-Trust Laws.

## IV.

The indictment does not charge a violation of the Sherman Act as it has been construed and interpreted by this Court.

A. If the Sherman Act is not applicable to labor unions and their activities, then the defendants cannot be indicted under this particular statute for causing a restraint of trade.

B. Even assuming the Sherman Act were applicable to the facts charged in the indictment, the allegations of Counts 1 and 2 as to the fixing of prices is a reasonable restraint of trade by labor unions within the meaning of the decisions of this court construing the statute.

C. Even assuming the Sherman Act is applicable to labor unions or their activities, the facts charged in the indictment do not show a direct, substantial or unreasonable restraint of interstate commerce or trade by the defendants within the meaning of the decisions of this court.

## V.

Under Section 8 of the Sherman Act, a labor union being a voluntary, unincorporated association is not a legal entity, and cannot be indicted for an alleged criminal violation of Section 1 of the Sherman Act.

## **ARGUMENT.**

---

### I.

The Sherman Anti-Trust Act of 1890 does not apply to labor unions or labor union activities, and the defendant union and the defendant union officials cannot be prosecuted under the Anti-Trust Act of 1890.

Under propositions I and II of our argument we frankly ask the court to overrule certain of its prior decisions. We support these requests by sound authority and respected precedents.

Asking this court to overrule prior decisions is not the usual argument in cases before this Court. But the case at bar is of great social importance and legal significance. The attorneys for the union and union officials, notwithstanding their recognition of the due weight to be attached to the careful decisions of justices of this Court and of other Federal Courts, nevertheless believe that the soundness of their contentions and the importance of this case requires such argument be made.

The case at bar is analogous to those cases where this Court has within the last three years recognized that the principle of *stare decisis* is not an ironclad guarantee for the perpetuation of undisputed error. It is with this premise in mind that we respectfully ask this Court to consider first, the Sherman Anti-Trust Act of 1890 (under I), and second, Section 6 of the Clayton Act of 1914 (under II) under the following general headings in an attempt to determine the legislative intent either to include or exclude labor unions from the domain of the Anti-Trust Laws:

- (1) The economic and social background prior to the Sherman Act of 1890 and of Section 6 of the Clayton Act of 1914;
- (2) The legislative history of the proposed bills that finally culminated with the enactment of each statute;
- (3) Contemporary reaction at and after the passage of the respective statutes.

A. The true congressional intent of the Sherman Act was to apply this Anti-Trust law only to business combinations and not to apply the Anti-Trust law to labor unions and their activities.

(1) *The Economic and social background of the Sherman Act of 1890.* The Sherman Act came into being as a result of the "trust" evils arising after the end of the Civil War. This Court has so stated. Mr. Chief Justice White in *Standard Oil Co. v. United States*, 221 U. S. 1 at Page 50, (1911) said concerning the causes for the enactment of the Sherman Act:

"... that the main cause which led to the legislation was the thought that it was required by economic condition of the times, that is, the vast accumulation of wealth in the hands of corporations and individuals, the economic development of corporate organization, the facility for combination which such organizations afforded, the fact that the facility was being used, and that combinations known as trusts were being multiplied, and the wide spread impression that their power had been and would be exerted to oppress individuals and injure the public generally." 221 U. S. at Page 50.

Even more emphatic is the analysis of Mr. Justice Harlan, who, although dissenting in part, agreed with the

"causes of enactment" described by Chief Justice White, in stating his version:

"All who recall the condition of the country in 1890 will remember that there was everywhere, among the people generally, a deep feeling of unrest. The Nation had been rid of human slavery—fortunately, as all now feel—but the conviction was universal that the country was in real danger from another kind of slavery sought to be fastened on the American people, namely, the slavery that would result from aggregations of capital in the hands of a few individuals and corporations controlling, for their own profit and advantage exclusively, the entire business of the country, including the production and sale of the necessities of life. Such a danger was thought to be then imminent, and all felt that it must be met firmly and by such statutory regulations as would adequately protect the people against oppression and wrong. . . .

Guided by these considerations, and to the end that the people, so far as interstate commerce was concerned, might not be dominated by vast combinations and monopolies, having power to advance their own selfish ends, regardless of the general interests and welfare, Congress passed the Anti-Trust Act of 1890.

... 221 U. S. at 83-84.

Nothing is said about labor unions.

In discussing "Trust Legislation" writers have called attention to the popular agitation against big business symbolized by the trust giants of the industrial world. Thus, the Granger Laws of the 1870's, the Federal Interstate Commerce Act of 1887, the Anti-trust laws of various states passed during the 1880's indicated the popular tendencies of the day. These popular tendencies demanded

and obtained the passage of the Sherman Act of 1890. With respect to the origin of this statute, it is also stated:

"Clearly the law was inspired by the predatory competitive tactics of the great trusts, and its primary purpose was the maintenance of the competitive system in industry."

15 Encyclopædia Social Sciences, at P. 113, (See the Bibliography at pp. 121, 122.)

Other writers in the fields of economics and political economy agree that the social history of the 1880's indicate that the Anti-trust legislation arose out of the evils of business individuals and business corporations. The writers do not recognize the "labor unions" as an evil requiring Anti-Trust legislation.

In the late 1880's there was no recognition of prospective danger to the American public arising from the existence or the activities of organized labor. This was before the organization of labor on a national scale. The Knights of Labor had by the period of 1890 become negligible in social effect. (Charles A. Beard "History of the United States" at P. 608.)

The debates in Congress including the rationale advanced by the sponsor of the Anti-Trust Legislation recognized that the "popular mind" was greatly concerned with the evils resulting from "concentration of wealth" into large combinations that resulted in combinations to destroy competition. See the words of Senator Sherman, 21 Cong. Rec. 2457, and 2460.

Beard "History of the United States," P. 492.

We contend that Congress intended to apply the Sherman Act of 1890 to business combinations—and did not

intend to include labor unions under such Anti-Trust Laws; this intent is clearly and conclusively shown by the Legislative History of proposed bills, the Congressional Debates and the Committee Reports.

The entire subject of the Congressional intent concerning labor in the passage of the Sherman Act is exhaustively treated by the "scholarly research" [of the kind mentioned by Justice Brandeis in *Erie R. R. v. Tompkins*, 304 U. S. 64, 73-74, (1938)] in:

Edward Berman "Labor and the Sherman Act" (1930).

From this leading source and from other authorities cited therein it is conclusive that Congress did not intend to have the Sherman Anti-Trust Act apply to labor unions or their activities; the purpose of that legislation—as its description implies—was to affect Business Combinations, i.e., the entrepreneur, not the laborer.

The law is undisputed that the Court considers Congressional records in arriving at the "Congressional intent."

*Loewe v. Lawlor*, 208 U. S. 274, 301 (1908).

It was stated that in interpreting the Sherman Act, the debates too will be considered for the purpose of

" . . . ascertaining the environment at the time of the enactment of a particular law, that is, the history of the period when it was adopted."

*Standard Oil Co. v. United States*, 221 U. S. 1, at 50 (1911).

Other decisions to the effect that debates in the Senate and the House though not directly available to "explain the meaning of the words of the statute", nevertheless will

be considered as reflecting light upon the general purposes of the Legislature and the evils which the Legislature sought to remove are:

*Humphrey's Executor v. United States*, 295 U. S. 602, 625, (1935).

*Federal Trade Commission v. Raladam Co.*, 283 U. S. 643, 650 (1931).

But the Government may argue that *Loewe v. Lawlor*, 208 U. S. 274, decided in 1908 held that the Sherman Act was applicable to labor unions.

In that event we answer:

B. This Court should adopt the true congressional intent of the Sherman Anti-Trust law and should overrule its prior decision in *Loewe v. Lawlor*.

*Loewe v. Lawlor*, 208 U. S. 274, decided in 1908 should be overruled because it was erroneously decided upon inadequate presentation by counsel to the Court.

In *Loewe v. Lawlor*, 208 U. S. 274 (1908) this Court disposed of the entire legislative history of the Sherman Act on the basis of the inadequate and incomplete facts stated in the brief for plaintiff in error to the effect that the several provisos which expressly exempted organizations of farmers and laborers from an *original* Sherman bill (which was never enacted) indicated congressional intent to include farmers and labor organizations in the bill, subsequently reported back by the Judiciary Committee—which latter bill was ultimately adopted as Section 1 of the Sherman Act. The brief on behalf of the union failed to *directly* raise the point that Congress did not intend to reach labor unions. The only contention made by the union having even a slight bearing on this question

was that the Sherman Act did not affect the union because they were not engaged in interstate commerce, had no aim to restrain it, and had not used any means to directly restrain interstate commerce (208 U. S. at 280-283).

This Court in its opinion sums up the legislative history by saying that

"The records of Congress show that several efforts were made to exempt, by legislation, organizations of farmers and laborers from the operation of the Act and that all these efforts failed, so that the Act remained as we have it before us."

208 U. S. at Page 301.

But this conclusion of the Court as we shall show *infra* under C by **detailed evidence** was based upon incomplete presentation by counsel for the union in that they failed adequately to present the complete legislative history not only of the original Sherman bill and the final statute as enacted, but also failed clearly to show to this Court the fact that the provisos exempting labor organizations which were added to the original Sherman bill were attached to anti-price raising measures. The Judiciary Committee bill which became the Sherman Anti-Trust Law was not an anti-price raising measure. The Senate as shown by debates believed that there was no necessity of *expressly* providing for exempting labor organizations from the Judiciary Committee measure. Also, the plaintiff in error's brief gave this Court the impression that the labor exemption provisos were omitted as a result of debates on which the general question of the propriety of discriminating in behalf of labor organizations was discussed by the Senate. This is not the fact. *The fact is that the labor provisos were not separately omitted but*

were discarded with the rest of the original Sherman Bill by the Judiciary Committee. The original Sherman Bill was sent to the Judiciary Committee not because the labor provisos which had been adopted troubled the senators but because numerous obstructive "humorous" and probably unconstitutional amendments had been added in such a fashion as to require complete revision of the measure by the Judiciary Committee.

The original Sherman Bill provoked frequent debates as to whether or not it would reach farmer and labor organizations. But the Judiciary Committee bill after being reported back to the Senate occasioned no discussion of this question during the prolonged debates in both the Senate and the House. The reason, therefore, must have been that it was understood and accepted that the bill reported by the Judiciary Committee did not reach labor and farmer organizations even though the original Sherman Bill seemed so to do.

In addition, the brief for the plaintiff in error in *Loewe v. Lawlor*, 208 U. S. 274, argued that after the passage of the Sherman Act and after the construction by the lower courts to the effect that the Sherman Act did apply to labor organizations, numerous proposals to Congress to exempt labor organizations failed to pass therefore indicating congressional intent to include labor within the Sherman Act. However, that brief also failed to mention that all except one of these proposals were proposals to render illegal those combinations which prevented competition and which raised prices. But these proposals were broader than the Sherman Act of 1890. The fact that there were specific provisos to exempt labor organizations from such later bills does not indicate congressional intent to include labor organizations in the Sherman Act of 1890.

See Edward Berman "Labor and the Sherman Act" (1930) at Page 85.

Berman severely criticizes counsel for the union in their presentation of the union side of the cause to this Court.

See Edward Berman "Labor and The Sherman Act" (1930) at Page 86.

Counsel for the present defendants are not aware of any case where this Court has been *expressly* requested to overrule the decision in *Loewe v. Lawlor*, 208 U. S. 274. This Court should overrule *Loewe v. Lawlor* because the decision is clearly wrong. The argument has been made that this Court in disregarding the congressional intent is acting in an "unconstitutional manner." See the vigorous language by dissenting Justice Mr. Harlan in *Standard Oil Co. v. United States*, 221 U. S. 1, where he stated that in referring to what he called the most important aspect of this case:

"... That aspect concerns the usurpation by the judicial branch of the Government of the functions of the legislative department. The illustrious men who laid the foundations of our institutions, deemed no part of the National Constitution of more consequence or more essential to the permanency of our form of Government than the provisions under which were distributed the powers of Government among three separate, equal and co-ordinate departments—legislative, executive and judicial."

221 U. S. at 103.

In that case, Mr. Justice Harlan contended that in adopting the "rule of reason," this Court was acting as a legislative body in violation of our Constitution. Whether that contention be correct or not; in placing labor organizations within the Sherman Act or in ignoring the clear literal meaning of Section 6 of the Clayton Act, has not this Court done something which is more than legislating

—has it not gone *contrary* to the intention of Congress? In this case, we are simply asking that this Court follow the congressional intent. This may involve the overruling of prior decisions. In view of the constitutional command that the departments of Government of the United States are to be separate and distinct, there is analogy to the reasoning of Mr. Justice Brandeis in the case of *Erie Railroad v. Tompkins*, 304 U. S. 64 (1938). If as Mr. Justice Brandeis expressed in that case, this Court in overruling the numerous precedents that had accumulated for more than a period of one hundred years was not bound by "traditional" error, then it is doubly true in the case at bar that *Loewe v. Lawlor* should be overruled. In 1890 Congress did not intend to include labor organizations within the meaning of the Sherman Act. In 1914 by Section 6 of the Clayton Act Congress was determined not only to reaffirm its position of 1890 but to obviate the results flowing from judicial legislation by this Court (See II, *infra*). It should follow that this Court will not choose to be bound by the principle of *stare decisis*, but will be obligated under the imperative direction of our Federal Constitution to declare that the indictment under the Sherman Act against the labor union or its officials for labor union activities cannot be sustained.

In addition to Constitutional obligation, we have the argument of social desirability. At the present time, the social wisdom of the Anti-Trust laws is being seriously questioned in many quarters. It has been stated that

"In recent years the Anti-Trust laws of the United States have been praised, condemned and amended more than any other one piece of Federal legislation. Some regard them as the bulwark of industrial liberties, while others see them as a Procrustean bed to which only Labor is required to conform."

Vol. 147, "Annals of the American Academy of Political Science" Foreword, (1930).

See also John D. Clark, "The Federal Anti-Trust Policy," pp. 56-57, 243, 270 (1931).

There is precedent under the decisions of this Court for "overruling precedent" under the Sherman Act for this Court has already several times in its history overruled prior decisions arising under the Anti-trust laws. For example, the decisions in the Rule of Reason cases overrules the earlier decisions of this Court, such as the *Trans-Missouri* cases. See *Standard Oil Co. v. United States*, 221 U. S. 1 at Pages 85 and 89. The decision in the *Northern Securities Company v. United States*, 193 U. S. 197 decided in 1904 in substance overruled the decision in *United States v. E. C. Knight Co.*, 156 U. S. 1, decided in 1895. The decisions in the *Maple Flooring Manufacturing Association v. United States*, 268 U. S. 563, decided in 1925, and *Appalachian Coals v. United States*, 288 U. S. 344, decided in 1933, in substance overruled the decision in *American Column and Lumber Co. v. United States*, 257 U. S. 377, decided in 1921.

Recent decisions of this Court which indicate that the principle of *stare decisis et non quieta movere* does not preclude this Court from determining the correctness of its prior position are:

1. Those cases which indicate this Court's recognition of the expansion of the Federal Commerce Clause;
2. Cases indicating the recognition by this Court of the expansion of the protection offered by the Federal Due Process Clause;
3. The expansion of the protection offered by the Equal Privilege Clause;

4. The expansion of the limits of administrative admissibility;
5. The expanding limits of the General Welfare Clause.
6. The State and Federal "income tax" cases.
7. Decisions such as *Erie Railroad v. Tompkins*, 304 U. S. 64 (1938).

It is respectfully submitted that this Court should not be precluded by *Loewe v. Lawlor* from reexamining the contention now advanced that the Sherman Anti-Trust Act does not apply to labor unions and their activities. Upon such re-examination that decision should be overruled.

#### C. Details and evidence of legislative history of the Sherman Act.

Prior to 1890 various bills against trusts had been introduced in both Houses of Congress. A complete legislative history of the various bills is found in "Bills and Debates Relating to Trusts, No. 147, Senate Documents, Volume 14, 57th Congress, 2nd Session, Pages 11, *et seq.*"

Also prior to 1890 various bills were introduced prohibiting arrangements tending to prevent full and free competition or tending to advance the cost of articles to the consumer. When these bills were debated, amendments expressly exempting labor organizations and organizations of farmers were offered (20 Cong. Rec. 1459). Discussion there indicated that the Congress desired to exclude labor and farmer organizations even from those statutes which would prohibit restraints of competition or the increase of prices to the consumer.

See Edward Berman "Labor and the Sherman Act" (1930) at Page 12.

A bill was originally presented by Senator Sherman on December 4th, 1889, entitled "A Bill to Declare Unlawful Trusts and Combinations in Restraint of Trade and Production." This bill was discussed, referred to the Committees on Finance of which Senator Sherman was chairman, and two amendments made by the Finance Committee were reported back to the Senate. On March 21st, 1890, the Bill as reported back was debated extensively in the Senate. The debates may be found in the Bills and Debates in Congress relating to Trusts, Senate Documents 147, 57th Congress, Second Session, at 1903. The debates indicated that some of the senators felt that the wording of the Sherman Bill which prohibited "restraint of full and free competition and combinations . . . or made with a view or which tend to advance the cost to the consumer" might relate to farmer and labor organizations because such organizations were concerned with raising "wages and prices" that they received. See the following references:

- ① 21 Cong. Rec. Pages 2467, 2468 (Senator Hiscock)
- 21 Cong. Rec. Page 2560 (Senators Teller and George)

The senators clearly indicated that they did not intend to prevent laborers and farmers from raising wages.

The important provisions of this original Sherman bill are as follows:

"Section 1. That all arrangements, contracts, agreements, trusts or combinations between two or more citizens or corporations . . . of different States, or . . . which tend to prevent full and free competition . . . and all arrangements, trusts, or combinations between such citizens or corporations *made with a view or which tend to advance the cost to the consumer of any such articles, are hereby declared to be against public policy, unlawful and void. . . .*" (Italics ours.)

This bill clearly failed to provide protection for labor unions in their attempts to raise wages which would result in raise of "costs" to the consumer.

Senator George specifically pointed this out (20 Cong. Rec. 1459).

Senator Teller argued that nobody intended to have this bill apply to labor unions. He said:

"I know that nobody here proposes to interfere with the class of men I have mentioned. Nobody here intends that by any of these provisions, either in the original bill or in any amendment; and I have only called attention to it to see if the effort of those who have undertaken to manage this subject cannot in some way confine the bill to dealing with trusts which we all admit are offensive to good morals." (21 Cong. Rec. 2562.)

Senator Sherman claimed his bill was not intended to reach labor unions. He said:

"It does not interfere in the slightest degree with voluntary associations made to affect public opinion to advance the interests of a particular trade or occupation. . . . And so the combinations of workingmen to promote their interests, promote their welfare, and increase their pay, if you please, to get their fair share in the division of production, are not affected in the slightest degree, nor can they be included in the words or intent of the bill as now reported." (21 Cong. Rec. 2562.)

Senator Hoar answered Senator Edmunds' argument that labor and capital should be treated alike. He said:

"If I correctly understood the Senator from Vermont (Edmunds) . . . he thought that the applying to

laborers in this respect a principle which was not applied to persons engaged in the large commercial transactions which are chiefly aimed at by this bill was indefensible in principle. Now it seems to me that there is a very broad distinction which, if borne in mind, will warrant this exception to the general provision of the bill. When you are speaking of providing to regulate the transactions of the men who are making corners in wheat and in iron or in woollen or cotton gains, speculating in them, or lawfully dealing in them without speculation, you are aiming at a mere commercial transaction, the beginning and end of which is the making of money for the parties, and nothing else. . . . The laborer who is engaged lawfully and usefully and accomplishing his purpose in whole or in part in endeavoring to raise the standards of wages is engaged in an occupation, the success of which makes Republican government itself possible and without which the Republic cannot continue to exist.

"I hold, therefore, that as legislators we may constitutionally, properly, and wisely allow laborers to make associations, combinations, contracts, agreements for the sake of maintaining and advancing their wages, in regard to which, as a rule, their contracts are to be made with large corporations who are themselves but an association or combination or aggregation of capital on the other side. When we are permitting and even encouraging that, we are permitting and encouraging what is not only lawful, wise, and profitable, but absolutely essential to the existence of the commonwealth itself.

"When, on the other hand, we are dealing with one of the other classes, the combinations aimed at chiefly by this bill, we are dealing with a transaction the only purpose of which is to extort from the community,

monopolize, segregate, and apply to individual use for the purposes of individual greed, wealth which ought properly and lawfully and for public interest to be generally diffused over the whole community." (21 Cong. Rec. 2728.)

After some discussion concerning the desirability of referring the Sherman Bill to the Committee on the Judiciary, Senator Sherman offered a proviso exempting labor and farmer organizations from the operation of the bill.

The next day, March 26, 1890, an additional proviso was offered by Senator Aldrich for the purpose of exempting labor. This too was adopted (21 Cong. Rec. 2643-2654; 2655). Thereafter, certain encumbering amendments were proposed and adopted by the Senate acting in a "humorous mood."

Edward Berman "Labor and the Sherman Act" (1930) at Page 22.

, The Senators consciously adverted to the fact that labor organizations and the like were not the evils at which the statute was aimed and in fact must be protected against attack or prosecution under the statute.

Senator Stewart (21 Cong. Rec. 2565)

The debates between Senator Hoar and Senator Edmunds clearly indicate that in enacting Anti-Trust legislation congress was not including labor union activities.

Senator Edmunds (21 Cong. Rec. 2727)

Senator Hoar (21 Cong. Rec. 2728)

Senator Hoar analyzed and discussed the comparative situations of labor and capital in the economic society of 1890 and pointed out the "economic differences."

After considerable debate the Bill as amended was referred to the Judiciary Committee to be reported out within twenty days.

After consideration the Judiciary Committee reported "back" with the Bill that was enacted as Section 1 of the Sherman Act. *Both the original Sherman Bill and the "proviso" amendments were eliminated.* The following tables illustrate the significant differences between the Sherman Act of 1890 and the proposed bill concerning which the Senators had voiced fears that they applied to labor unions:

**Bill as referred to Judiciary Committee with Sherman amendment (proviso clause):**

"All arrangements, contracts, agreements, trusts or combinations between two or more citizens or corporations . . . which tend to prevent full and free competition . . . and all arrangements, trusts or combinations between such citizens or corporations made with a view or which tend to advance the cost to the consumer of any such articles are hereby declared to be against public policy, unlawful and void, *provided* that this act shall not be construed to apply to any ar-

**Bill as reported by Judiciary Committee which made it unnecessary to have Sherman amendment:**

"Sec. 1. Every contract, combination, in the form of trust or otherwise, or conspiracy in restraint of trade or commerce among the several states or with foreign nations is hereby declared to be illegal.

"Sec. 2. Every person who shall monopolize, or attempt to monopolize, or combine, or conspire with any other person or persons to monopolize any part of the trade or commerce among the several states or with foreign nations shall be

**Bill as referred to Judiciary Committee with Sherman amendment (proviso clause):**

arrangements, agreements, or combinations between laborers, made with the view of lessening the number of hours of their labor or of increasing their wages; nor to any arrangements, agreements, associations, or combinations among persons engaged in horticulture or agriculture, made with a view of enhancing the price of their own agricultural or horticultural products."

**Bill as reported by Judiciary Committee which made it unnecessary to have Sherman amendment:**

deemed guilty of a misdemeanor. . . ."

The Senate debated upon the measure reported back by the Judiciary Committee. But the debates did not touch upon any question of exemptions for labor unions. It was assumed that the committee bill did not "cover" labor unions. The Senators were concerned with the problem whether the measure proposed by the Judiciary Committee would serve the intended purpose of eliminating the "business evils."

As typical of the Senate debate after the bill was reported from the Judiciary Committee, Senator Hoar said that the bill was in answer to the complaints

"from all parts and all classes of the country of these great monopolies which are a *menace to Republican institutions*. . . . We have affirmed the old doctrine of

the common law in regard to all interstate and international *commercial* transactions." (Italics ours.) (21 Cong. Rec. 3146.)

These debates show that the Senate *must* have assumed that the Judiciary Committee measure did "*sub silentio*" do that which the Senators stated they wished to avoid: i. e., avoid applying Anti-Trust legislation to labor organizations and their activities.

Also, the debates in the House of Representatives on the Judiciary Committee proposal indicate that the House, too, treated the Judiciary Committee measure as being inapplicable to labor organizations.

The records show that no person in the House expressed any reference as to the possible application of the law to labor unions. A reference to labor unions was made by way solely of illustration in the remarks of Representative Stewart on June 11th, 1890, in a discussion of the bill as reported by the House and Senate Conference. Stewart in criticizing the bill on the ground that he thought that it would compel unwise competition among the railroads, remarked in the course of his argument:

"Why do the laborers organize and combine to put up the price of labor, and so enhance the cost of everything to the consumer? Because of excessive competition. Yet my friend from Missouri (Rep. Bland) does not propose to apply any remedy in that direction. Nothing more largely affects the cost of articles to every consumer—than *the combinations of labor. Who complains of it? I do not. I think the laborer is justified*, where competition is excessive . . . in entering into combinations for self-protection" (21 Cong. Rec. 5956). (Italics ours.)

Here again is legislative recognition of the fact that labor organizations and their activities were *not* the evils at which the legislation was aimed. Here too is legislative recognition of the unique position of labor unions in the system of American economy; that even though higher wages obtained by unions may result in a price increase to the consumer, nevertheless our economic system regards *this* price increase as justifiable.

Accordingly, the House adopted the Judiciary Committee measure. The Judiciary Committee measure was finally enacted and is the Sherman Act as it now stands in the statute books.

What conclusion can be drawn from the foregoing legislative history other than Congress did not intend to include labor unions within the Sherman Act?

#### **Contemporary opinion.**

Apparently the Congressional intent to exclude labor unions from the domain of the Sherman Act was well known to contemporary opinion.

Samuel Gompers, in 1910, then President of the American Federation of Labor, stated:

"We know the Sherman law was intended by Congress to punish illegal trusts and not the labor unions, for we had various conferences with members of Congress while the Sherman Act was pending, and remember clearly that such a determination was stated again and again" (17 American Federationist, 197, 202).

During the course of the inquiry by the United States Commission on Industrial Relations, Commissioner Lennon answered in reply to an assertion by a lawyer who said that the Sherman Act was intended to apply to labor unions:

"I had the pleasure of interviewing Senator Sherman and Senator Plumb and a large number of gentlemen in the Senate at the time, and they did not look upon it in that way." 16 Report of U. S. Commission on Industrial Relations (1916) P. 10854.

To the same effect as shown in autobiographies of individuals most prominent in the enactment of the Sherman Act, see:

- 2, Hoare, "Autobiography of Seventy Years," 264.
- 2, Sherman, "Recollections of Forty Years."

The Attorney General of the United States in 1893 recognized that the Federal district (trial) judges had ignored the intention of the authors of the Sherman Act, for in his "Annual Report for 1893," in discussing the Sherman Anti-Trust Law, he first referred to the application of the statute to "businesses," and then he added:

*"It should, perhaps, be added, in this connection—as strikingly illustrating the perversion of a law from the real purpose of the authors—that in one case the combination of laborers known as a 'strike' was held to be within the prohibition of the statute, and that in another, rule 12 of the Brotherhood of Locomotive Engineers was declared to be in violation thereof."*

at pp. XXVII-XXVIII. (Italics ours.)

Finally, the entire history of the proposed enactment as shown in Vol. 21 of the Congressional Record, especially from March 21, 1890 to the enactment of the Sherman Law on July 2, 1890 shows that newspapers, periodicals and the like knew with certainty that the Sherman Act did not involve "labor"—the statute was not intended to apply to labor.

### The decisions under the Sherman Act to 1908.

A complete collection and discussion of the decisions by the "lower" Federal Courts under the Sherman Act is given by Berman "Labor and the Sherman Act," at pp. 57-75. His collection, analysis and criticism is complete and authoritative. To avoid repetition we respectfully refer the Court to the place so indicated.

One fact we call attention to is this Court's decision in *In Re Debs*, 158 U. S. 564, at 599-600, decided in 1895 where this Court *carefully* avoided the approval of the District Court's opinion as based on its application of the Sherman Act of 1890. This Court chose to rest the decision on other grounds.

So the first square decision by this Court on the question of the applicability of the Sherman Act to labor unions is the *Danbury Hatters* case, *Loewe v. Lawlor*, 208 U. S. 274 (1908). We have already quoted from that case with reference to the question of "Congressional intent" (208 U. S. 301) and have shown, we believe, the error to which this Court was led with reference thereto. Berman, opus cited at pp. 77-86, discusses and analyzes this case. Consider this decision in the light of Berman's analysis of the earlier cases, one of which (*U. S. v. Workingmen's Council*, 54 Fed. 994) (1893) is cited by this Court as an authority for its decision.

The traditional legal technique of differentiation, distinguishing facts, examining bases of decision may well be employed in performing the legal "operation" with the "*stare decisis*" tools upon the decision of *Loewe v. Lawlor*. We prefer, however, to rest our contentions on the broadest grounds. *Loewe v. Lawlor* is bad law. It should be overruled.

Contrast the departure from the Congressional intent in *Loewe v. Lawlor* with the learned decision of Roscoe Pound in *Cleland v. Anderson*, 66 Nebr. 252, 92 N. W. 306 (1902). The latter decision breathes the spirit of the intent concerning labor unions during the congressional debate. This analysis and this decision are sound; labor and capital are not alike, and in determining legislative intent in "Anti-Trust Legislation" due recognition should be given to that factor of social difference.

Contrast *Loewe v. Lawlor* with the decision and reasoning in *State v. Coyle*, 8 Okla. Cr. 686, 130 Pac. 316 (1913), where the Court holds that an Anti-Trust Act exempting labor unions is not contrary to Constitutional command.

### Summary.

*Loewe v. Lawlor* though decided on a misapprehension of the Congressional intent has been accepted as determining that the Sherman Anti-Trust laws applied to labor unions. We respectfully submit that the decision does not stand up under sound analysis and impartial historical research. It was erroneously decided, it has been erroneously applied in labor cases, it is still subject to the blight of the original error, and should be overruled by this Court.

## II.

**By the passage of Section 6 of the Clayton Act of 1914, Congress intended to overrule this Court's decision in Loewe v. Lawlor.**

**A. The true Congressional intent of Section 6 of the Clayton Act was to reiterate the original intention of the Sherman Act of 1890.**

**1. Economic and Social Background of Section 6 of Clayton Act.**

In 1914 Congress reconsidered the entire problem of "Anti-Trust" legislation. The decisions by this Court, and the various trial Courts under the Sherman Act did not satisfy the people of this country.

Accordingly the Democratic Congress, including numerous Progressive Republicans, in accordance with the Democratic platform of 1912, and in accordance with the philosophy of President Woodrow Wilson's "New Freedom," set about to "solve" the trust problem.

The results were the various bills that finally culminated in the Clayton Act of 1914. (Volstead: 51 Cong. Rec. 9077, gives historical summary of this legislation.)

It was again recognized that labor and capital did not stand on the same footing.

(Bailey: 51 Cong. Rec. 9155-9156.)

As finally enacted Section 6 read as follows:

"That the labor of a human being is not a commodity or article of commerce. Nothing contained in the anti-trust laws shall be construed to forbid the existence and operation of labor, agricultural or horticultural organizations, instituted for the purpose of mutual

help, and not having capital stock or conducted for profit, or to forbid or restrain individual members of such organizations from lawfully carrying out the legitimate objects thereof; nor shall such organizations, or the members thereof, be held or construed to be illegal combinations or conspiracies in restraint of trade, under the antitrust laws." (Oct. 15, 1914, Chap. 323, Sec. 6, 38 Stat. 731; 15 U. S. Code, Sec. 17.)

#### (2) Legislative History of Section 6 of Clayton Act.

Our contention under this heading is the same as under I, *supra*. Our technique is substantially the same. There is, however, no authoritative condensation of the history of this Act, and of necessity we have been therefore required to quote at length from Congressional records.

In tracing the history of this statute we see that there were numerous proposals to amend the bill as originally proposed.

The bill as originally introduced in the House did not fully exempt labor from the Anti-Trust laws.

As reported with amendments by the House Judiciary Committee, Section 6 of the Clayton Bill, relating to labor unions contained only the following sentence.

"that nothing in the anti-trust laws shall be construed to forbid the existence and operation of fraternal, labor, consumers, agricultural or horticultural organizations, orders, associations, instituted for the purpose of mutual help, and not having capital stock or conducted for profit, or to forbid or restrain individual members of such organizations, orders, or associations from carrying out the legitimate objects thereof."

H. Rept. No. 627, 63rd Cong. 2d Sess. to accompany H. R. 15657. In this form, and as it went through Congress, Sec-

tion 6 was numbered Section 7, and is so designated in the debates which we quote *infra*.

(Note the words: "existence and operation." That is what Justice Pitney in *Duplex Press v. Deering*, said the final draft of this statute meant.)

With respect to this proposed bill, Congressman Kelly said:

"This section properly amended, will help to write the gospel of humanity into the law. It is a recognition of the fundamental difference between human labor and the products of labor. Legislation dealing with trusts can not be justly applied to the association of workers for their own betterment and approval. I stand for the right of labor to organize for its own advancement and to work for that purpose without being outlawed for it."

(51 Cong. Rec. 9086.)

In the course of the debate on this section as it then read it was pointed out that its limited language failed to accomplish its purported purpose of exempting labor unions from the anti-trust act.

See Congressmen Floyd (51 Cong. Rec. 9166), McDonald (*id.* 9249), Volstead (*id.* 9082).

The basis of this objection was that the language of the bill in its then state only protected the "existence of labor organizations" and not "the exercise of their vital functions."

It was recognized that the Sherman Act of 1890 as enacted had been accepted by the Senate as having the same meaning as the proposed Sherman bill that expressly exempted labor (51 Cong. Rec. 9540). And it was further argued that in 1890 the Congress did not intend to prohibit

"farmer's unions" from fixing prices for their products (51 Cong. Rec. 9540). But in order to meet the vital objection that the original Clayton bill did not fully protect labor from the Anti-Trust Laws, several amendments were offered (51 Cong. Rec. 9538). On June 1, 1914, the so-called Webb amendment added to Section 6 the following clause:

"nor shall such organizations, orders, or associations, or the members thereof, be held or construed to be illegal combinations or conspiracies in restraint of trade under the antitrust laws" (51 Cong. Rec. 9538).

The meaning of this amendment is given by Congressman Henry in the following extract:

(Mr. Henry)—"Mr. Chairman, there has been so much controversy about what was intended when the original Sherman Antitrust Law was passed that I think we should make clear just what was intended by this law. Some of us do not believe Section 7 as originally written by the Committee on the Judiciary expressed exactly what should be in this bill. Therefore, we took exception to the language of the first part of the paragraph in Section 7 and insisted there should be additional language. Among others who agreed that the language was not plain enough were the gentleman from North Carolina, Mr. ~~W~~atchin, the gentleman from Illinois, Mr. Hinebaugh, the gentleman from Illinois, Mr. Graham, the gentleman from Iowa, Mr. Towner, the gentleman from Maryland, Mr. Lewis and myself. We met to confer, and concluded that we ought to make the language more explicit. In that conference held in the Committee room of the Committee on Rules, on the evening of May 21st, 1914, we agreed that this language should be added at the end of the first paragraph of Section 7, to wit, after the word

'thereof': 'nor shall such organizations, orders, or associations or the members thereof be held or construed to be illegal combinations or conspiracies in restraint of trade under the antitrust laws.'

"This language I have read is exactly the verbiage used by the gentleman from North Carolina (Mr. Webb) in the amendment offered by him and is the amendment agreed upon by Mr. Kitchin and our conferees in my office. The Committee on the Judiciary courteously accepted the language as proposed by the gentleman in the conference, believing I assume that we were correct and that the original language used by them was not explicit. So we came to a satisfactory agreement with the House Judiciary Committee about this addition to the first part of Section 7, and, so far as I am concerned we are standing squarely with the Committee for that paragraph with our added language. *We called into the conference with us the heads of the American Federation of Labor and submitted this amendment to them, and said to them that we believed its adoption as an addition to Section 7 would clearly exempt labor organizations and farmers' organizations from the provisions of the antitrust laws.*

"They agreed with us; they called their counsel into the conference with us and we all concurred that this amendment added to the paragraph of Section 7 would give these organizations what they have desired so long, and all they have been struggling for since the original enactment of the Sherman antitrust laws.

"In my judgment, when Congress was dealing with 'combinations in restraint of trade' it never intended that the law should apply to labor organizations or farmers' organizations without capital and not for profit. The courts took a different view of it and construed the Act as it was never intended that it should

*be interpreted.* The time has come when we can *correct that error* and write the language in the law as those gentlemen insist that it should be and should have been \* \* \* (51 Cong. Rec. 9540).

"Now gentlemen, organized labor has never asked that they be permitted under the law to commit crimes or to do unlawful things. They have never come to this government and pleaded for special privileges. They have never asked for anything to which they are not entitled at our hands. They have said that when we are dealing with **conspiracies in restraint of trade and combinations and trusts** it was never intended that *the man who sells his labor*—his God-given right—should be classed as *conspiracy against trade or any unlawful combinations against the antitrust laws*. We are now about to correct that *error*, and make it plain and specific, by clear-cut and direct language that the antitrust laws against conspiracies in trade shall not be applied to labor organizations and farmers' unions." \* \* \* (51 Cong. Rec. 9541). (Italics ours; bold face, author's).

A reading of the debates conclusively shows that Congress intended to correct the error that the courts had committed in rejecting (by judicial legislation) the intent of the sponsors of the Sherman Act to exempt labor unions. After the passage of Section 6 of the Clayton Act, Congress believed that the meaning could not be denied! Labor was to be exempted from the Anti-Trust Laws.

Congressman Thomas used the following forceful language:

"\* \* \* These anti-trust laws are intended for the suppression of monopolies and trusts. Who ever heard of an agricultural trust? Who ever heard of a laborer's trust?" \* \* \* (51 Cong. Rec. 9545).

See, for example, the following Congressmen substantially expressing the same thought:

McDonald, 51 Cong. Rec. 9545.

Konop, 51 Cong. Rec. 9545.

Quin, 51 Cong. Rec. 9546 (strongly criticizing the courts for their interpretation of the Sherman Act).

Towner, 51 Cong. Rec. 9548.

Johnson, 51 Cong. Rec. 9549.

Barkley, 51 Cong. Rec. 9553.

Raker, 51 Cong. Rec. 9551.

Crosser, 51 Cong. Rec. 9556.

Casey, 51 Cong. Rec. 9557.

Lewis, 51 Cong. Rec. 9565.

LaFollette, 51 Cong. Rec. 9573.

Congressman Hensley said that labor organizations should "not be affected" by the Sherman Law.

This Webb amendment was adopted without a single dissent; 207 ayes, no nays (51 Cong. Rec. 9567).

Some Congressmen believed that even the Webb amendment failed to put labor outside "the pale" of the Anti-Trust laws, *i. e.*, they wanted even stronger language. The house rejected this contention and an accompanying "strengthening" amendment (51 Cong. Rec. 9569). The House believed that the meaning was clear—no stronger language was needed.

In the House it was conceded that the principle of labor not being a commodity carried with it as a *necessary* implication, its complete exemption from the provisions of the Sherman Antitrust Law.

Congressman Murdoch said:

"I am in favor of a law here which will directly in terms exempt labor unions from the provisions of the

Sherman antitrust law. I do so because I believe, in the first instance that labor is not a commodity" (51 Cong. Rec. 9568).

Congressman Lewis believed that Section 6 as proposed in the House (June 1, 1914) placed "American workmen where the British workman was placed by Parliament in 1906." He predicted that if the measure would be enacted into a law it would become known as the "Great magna charta of American workmen" (51 Cong. Rec. 9565).

The bill as thus passed by the House was then transmitted to the Senate on June 5th, and Section 6 of the House bill was reported by the Senate Judiciary Committee to the Senate virtually unchanged.

The debates in the Senate indicated the intention of the Senate to exempt labor unions from the Anti-Trust laws.

The Senate debate on the bill indicated certain Senators doubted whether Section 6 as submitted by the House and including the Webb amendment had completely exempted labor unions from the Anti-Trust laws.

On Aug. 17, 1914, in discussing H. R. 15657 in the Senate, Senator Thompson reopened the discussion with the statement that

"• • • one of the most important features of the pending bill commonly known as the Clayton Act or anti-trust bill—H. R. 15657—is the exemption of labor and farmers' organizations from the operation of the Anti-Trust laws" (51 Cong. Rec. 13844).

In the discussion between Senators that followed it was clear that the purpose of the legislation being considered was the "exemption of labor and farmer organizations" (51 Cong. Rec. 13845).

Senator Cummins, one of the Senators who wished to conclusively exempt labor, introduced his amendment containing the clause "that the labor of a human being is not a commodity or article of commerce."

The amendment intended by Mr. Cummins to the bill H. R. 15657, 63 Cong. 2d Sess. Aug. 19, 1914 is as follows:

"Sec. 7. That the labor of a human being is not a commodity or article of commerce, and nothing contained in the antitrust laws shall be construed to forbid the existence and operation of labor organizations having for their objectives bettering the conditions, lessening the hours or advancing the position of labor, nor to forbid or restrain individual members of such organizations from carrying out said objectives in a lawful way; nor shall said laws be construed to prevent or prohibit any person or persons, whether singly or in concert, from terminating any relation of employment or from ceasing to work or from advising or persuading others in a peaceful, orderly way, and at a place where they may lawfully be; either to work or abstain from working, or from withholding their patronage from a party to any dispute growing out of the terms or conditions of employment or from advising or persuading other wageworkers in a peaceful and orderly way so to do and from paying or giving or withholding from any person engaged in such dispute any strike benefits or other monies or things of value, or from assembling in a peaceful and orderly way for a lawful purpose in any place where they may lawfully be, or from doing any act or thing which might lawfully be done in the absence of such dispute. Nothing contained in said antitrust laws shall be construed to forbid the existence and operation of agricultural, horticultural or commercial organizations instituted for

mutual benefit without capital stock and not conducted for the pecuniary profit of either such organization or the members thereof or to forbid or restrain such members from carrying out said objectives in a lawful way."

There was considerable debate. Finally debates were ordered brought to a close on August 29, 1914 to vote on the Cummins amendment (51 Cong. Rec. 14364).

The conflict was between Section 6 as reported by the Senate Judiciary Committee with the Webb amendment, and the amendment proposed by Senator Cummins above cited. But it is clear that both sides were seeking the same result: exemption of labor from the Anti-Trust Laws. The dispute was simply concerning the "means."

The discussion on September 2, 1914 between Senators Pittman and Cummins indicates the unanimity of intention:

Mr. Pittman: "The bill, as reported by the Committee intends to exclude such organizations from the purview of this statute and I believe it does; and if I did not believe it did so I would offer an amendment to that effect. . . . The very object of this legislation is to eliminate that discretion. . . . Now if they cannot be held or construed to be illegal combinations or conspiracies then they are not subject to prosecution under this Act, or not subject to the jurisdiction to the court under this Act. The last clause of Section 7, which I have just read, carries out the very purpose of organized labor, that is to say, that this legislation has nothing to do with organized labor, that any unlawful acts committed in the pursuit of the objects of their organizations shall be tried and determined by other existing laws. That is what it means. . . ." (51 Cong. Rec. 14587-88). (Italics ours.)

Mr. Cummins: "Mr. President, I simply wish to suggest to the Senator from Nevada that in my view he has stated just what Section 7 does not do. Section 7 still leaves every act of a labor union or any member of a labor union to be tested by the anti-trust laws and its lawfulness must be determined by the provisions of the anti-trust laws. That is precisely what I want to avoid by my amendment." (Italics ours) (51 Cong. Rec. 14588).

Mr. Pittman: "... I further contend that unless his (Sen. Cummins) amendment contains this clause which is in the Committee report, namely, 'Nor shall such organizations, etc.' he does not remove them from the purview of this statute" (51 Cong. Rec. 14588). (Italics ours.)

Mr. Pittman asserted that the Cummins amendment would only protect the mere *organization of labor* unions, whereas the Committee amendment in substance said that labor unions were not subject to the Anti-Trust Laws (51 Cong. Rec. 14588).

Pittman: ...

"There are two distinct effects of the act. One of them looks to the dissolution of the union; the other looks to the prosecution of the union or its members under the act. The Senator's (i.e. Cummins) amendment seems to me only to go to the first effect, the dissolution of the union, and does not protect the union or the members thereof against action under this act; while the Senate bill, or Section 7, reported by the Committee, does have that effect when it says in very plain and distinct language that such organizations or the members thereof shall not be held or construed to be illegal combinations or conspiracies in

restraint of trade under the anti-trust laws. . . . In plain language it says that those organizations and members thereof shall not be subject to the act" (51 Cong. Rec. 14588).

A compromise was suggested that the committee bill should merely take over the first sentence of the Cummins' amendment, namely, "that the labor of a human being is not commodity or article of commerce." It was argued that both houses would be satisfied, and the desired result of exempting labor would be secured without any doubt.

So the Cummins' amendment *in toto* was rejected. Senator Culberson proposed amendment of Cummins' first sentence (51 Cong. Rec. 14590) was adopted.

So we see that in the House, the Webb amendment was added in order to meet the specific objection that the bill could not accomplish its intended purpose of completely exempting labor unions from the Sherman Act. In the Senate, the Culberson amendment was added for the very same reason. Courts should not ignore such plain and undisputed meaning. Senator Cummins' reasoning was expressed:

"I precede the amendment I have offered with the statement that ought to be in the law somewhere for it would solve many of the problems which have vexed the courts and vexed those who have discussed the question, namely, that the labor of a human being is not a commodity or article of commerce.

" . . . if we do not recognize the difference between the labor of a human being and the commodities that are produced by labor and capital we have lost the main distinction which warrants, justifies and demands that labor organizations coming together for the purpose of bettering the conditions under which they

work, of lessening the hours which they work, and of increasing the wages for which they work, shall not be reckoned to be within *a statute which is intended to prevent restraints of trade and monopoly*" (51 Cong. Rec. 14585). (Italics ours.)

The history of the Gallinger proposal clearly indicates the error committed by Justice Pitney. On August 19th, 1914, Senator Gallinger introduced an amendment to provide "nor shall such organizations *when lawfully conducted* be held or construed to be illegal combinations or conspiracies in the scope of trade under the anti-trust laws" (51 Cong. Rec. 14528, Sept. 1, 1928). (Italics ours.)

Senator Gallinger made two attempts to have his amendment passed. It was defeated (51 Cong. Rec. 14530, 14544). (Yet Mr. Justice Pitney in *Duplex Press v. Deering* treated Section 6 as if it read like the rejected proposals of Senator Gallinger.)

On September 2, 1914 just before the vote was taken on the bill as a whole, Senator Gallinger once more protested:

"In view of the fact that the Senate deliberately refused to agree to the amendment I offered to the bill yesterday, which amendment proposed to insert the word 'lawful' in Section 7, I find it impossible to support the provision as it now stands. I do not think that right-thinking laboring men and women want the privilege of doing anything that is unlawful" (21 Cong. Rec. 14608).

Whereupon Senator Kern, in answer to the protest of Senator Gallinger, introduced an editorial from the "Outlook" of June 14, 1914. This editorial took the view that the provisions of the Clayton Bill did exempt labor unions and should exempt labor unions. The editorial stated:

"... The real object ... represent the recognition ... of the fact that labor unions ought not to be pros-

cuted under the Anti-Trust Laws. . . . The whole question whether labor unions should come under the operations of the anti-trust law rests upon the question of whether labor is merchandise or not . . . from the point of view of some economists, labor is regarded as a commodity . . . This is the only ground on which the application of the anti-trust laws to labor unions can be defended" (51 Cong. Rec. 14608).

The bill was then passed by the Senate 46 to 16 (51 Cong. Rec. 14610) and as thus enacted was placed on the statute books.

American labor hailed this legislation as labor's "Magna Charta."

See Gompers: "The charter of Industrial Freedom—Labor Provisions of the Clayton Anti-Trust Law," 21 American Federationist, p. 957.

But this rejoicing was premature.

#### **Conclusions from Consideration of the Complete Legislative History of Section 6 of the Clayton Act.**

The study of the Legislative History of Section 6 of the Clayton Act indicates that (1) in 1914 labor still persisted in its contention that Congress never intended to include labor unions within the meaning of the Sherman Act of 1890; (2) that labor insisted that the decision of *Loewe v. Lawlor* was contrary to Congressional intent; (3) that the workings and mechanics of the legislative process in a democracy from 1908 to 1914 were intended to remove labor from the purview of the Anti-Trust laws; (4) that the Senators and Representatives were in accord with the intent of Labor because they believed labor and capital stood upon different footings; (5) Congress acted in the belief that it had forever "laid to rest" the rule of *Loewe v. Lawlor*.

Our conclusion is most strikingly drawn by posing this question: Why should labor be deprived of the protection afforded by Section 6 of the Clayton Act of 1914?

The decision in *Duplex Press v. Deering*, 254 U. S. 443 (1921) by a divided court (6 to 3) apparently decides that congressional intent of Section 6 of the Clayton Act is to be disregarded. But let us examine the background of that case.

#### Decisions Under Section 6 of the Clayton Act.

In *Paine Lumber Co. v. Neal*, 244 U. S. 459 (1917) the question of Section 6 was incidentally discussed by Mr. Justices Holmes (244 U. S. at 471) where he implies that his opinion (in the minority) was to the effect that the Clayton Act "established a policy inconsistent with the granting" of an injunction against a labor union on the alleged ground of violation of the Sherman Act. But he concluded that under the Sherman Act no injunction could be issued in favor of a "private individual", and that since the Clayton Act of 1914 was passed after the decision below it did not apply to the case at bar. But Mr. Justice Pitney speaking for the dissenting minority *foreshadows* his decision in *Duplex Press v. Deering* by contending that even in the *absence* of express provision in the Sherman Act permitting an individual to bring an injunction suit equity should grant an injunction against the labor union on the ground that the finding of facts showed "irreparable injury through a violation of property rights and there is no adequate remedy at law . . ." (244 U. S. at 473). He also points out the fact that federal jurisdiction was invoked *both* on the ground of diversity of citizenship and the provisions of the Anti-Trust laws. (244 U. S. at 472.)

In other words Justice Pitney says an injunction should be granted without considering the Sherman Anti-Trust Act.

In *Duplex Press Co. v. Deering*, 254 U. S. 443 (1921) the jurisdiction of the Federal Court was invoked on grounds of both diversity of citizenship and for alleged violation of the Sherman Act.

With respect to Section 6, Justice Hough of the Circuit Court of Appeals had stated:

"Insofar as the courts are permitted to study legislative proceedings and contemporary history for aid in statutory interpretation, we consider it plain that the designed, announced, and widely known purpose of Section 20 (perhaps in conjunction with Section 6) was to legalize the secondary boycott." (*Duplex Press v. Deering*, 252 Fed. 722, 748) (1918).

Mr. Justice Pitney speaking for the majority of this court held in favor of the argument that had been previously advanced against the labor union in the earlier case of *Paine Lumber Co. v. Neal* (See brief of plaintiff in error, 244 U. S. at pp. 467-468).

#### **B. Justice Pitney Erred in Interpreting the Statute and this court should overrule *Duplex Press v. Deering*.**

The issue before the court was whether the Sherman Act as amended by Section 6 of the Clayton Act applied to labor unions. On this issue Justice Pitney speaking for the majority said:

"As to Section 6, it seems to us its principal importance in this discussion is for what it does not authorize, and for the limit it sets to the immunity conferred. The section assumes the normal objects of a labor organization to be legitimate, and declares

that nothing in the antitrust laws shall be construed to forbid the existence and operation of such organizations or to forbid their members from *lawfully* carrying out their *legitimate* objects; and that such an organization shall not be held in itself—merely because of its existence and operation—to be an illegal combination or conspiracy in restraint of trade. But there is nothing in the section to exempt such an organization or its members from accountability where it or they depart from its normal and legitimate objects and engage in an actual combination or conspiracy in restraint of trade. And by no fair or permissible construction can it be taken as authorizing any activity otherwise unlawful, or enabling a normally lawful organization to become a cloak for an illegal combination or conspiracy in restraint of trade as defined by the anti-trust laws." (254 U. S. at 469) (italics by court)

We submit that Justice Pitney's conclusion was erroneous in view of the Legislative History of Section 6 of the Clayton Act.

As a matter of precedent, there was no necessity for construing Section 6; it meant just what it said. It said that labor was not to be included within the purview of the Anti-Trust laws. If labor was not included within the purview of the Anti-Trust laws it simply meant that *this* statute did not prohibit restraints of trade by labor unions. Where Justice Pitney erred in discussing a "disguise" was in not realizing that if the acts of labor unions were illegal by *other* State and Federal laws they could be prosecuted for violating the same. In refusing to permit labor unions to become "a cloak for an illegal combination" he was simply begging the question—for the

question was whether the Sherman Act as modified by Section 6 of the Clayton Act did render combinations of labor in restraint of trade illegal.

Reference to the legislative history was made by Justice Pitney 254 U. S. at pp. 474-475. But here again the briefs for the labor union apparently failed to give this court an adequate or complete picture. Here too, we respectfully submit, this court erred in its interpretation of the "legislative history" of a statute.

Merriam, the eminent American historian has summed upon the decisions by this court under the Sherman Act up to 1917—and this would apply with even greater force to *Duplex Press v. Deering*,

"The Anti-Trust Law of 1890 was sustained, but the rule of reason developed in the *Standard Oil and Tobacco* cases left the public mind in a dazed condition as to the real significance of the Act. In dealing with the problems of monopoly and competition and of organized labor and capital, the courts encountered stormy seas, and on the whole did not master the situation. The novel and free use of the courts' veto, the strict application of ancient rules to new situations, entirely alienated the confidence of labor, and resulted in the widespread loss of popular trust in juristic ability to administer even-handed justice in an admittedly difficult situation. Of the three classes of cases, those affecting the prohibition of monopoly, the regulation of industry, the position of organized labor, the court left the public in doubt as to first, perplexed, as to the second, and aroused, united opposition of organized labor as to the third."

Merriam: "American Political Ideas", at pp. 150-151 (1920).

We respectfully urge that *Duplex Press v. Deering* be overruled in so far as it purports to determine the legislative intent of Section 6 of the Clayton Act.

### III.

Recent Federal legislation indicates congressional recognition of the same economic differences between labor and capital that impelled the Federal Congress to exclude labor unions and their activities from the Federal Anti-Trust Laws.

Recent Federal legislation has indicated congressional intent to remove labor union activities from the application of the Federal Anti-Trust laws.

It is a matter of common knowledge that ever since the decision of this Court in *Duplex Press v. Deering*, 254 U. S. 443, labor has constantly renewed its pleas to the Federal Congress to the end that labor union activities be freed from the burden of the Anti-Trust laws whether it be by the more common mode of injunction or the less frequent means of the indictment.

Labor sought to be freed from the effects of the decisions in *Duplex Press v. Deering*, 254 U. S. 443, and *Bedford Cut Stone v. Journeyman Cutter's Association*, 274 U. S. 37. Under Sections 4 and 5 of the Norris-LaGuardia Act of 1932 it appears as if labor has been successful. (March 23, 1932, Chap. 90, Sects. 4-5, 47 Stat. 70-73; 29 U. S. Code, Sects. 104-105.)

Next, consider the provisions of the Wagner Labor Relations Act. (July 5, 1935, Chap. 372, Sect. 8-3, 48 Stat. 453; 29 U. S. Code, Sects. 159, (3).)

That statute specifically legalizes some of the restraints which the Anti-trust laws have been inter-

preted as preventing. Under the Wagner Labor Relations Act as far as labor is concerned, it may monopolize commerce in the sense that it tends to unionize the entire country—and even though this will result in the rise of prices. The Anti-trust laws were designed to foster competition by preventing combination. The purpose of the Wagner Labor Relations Act is to encourage combination of workers in forming groups for collective bargaining. The Anti-trust laws were passed on the basis of the economic philosophy that individual economic competitive action was the supreme goal. The passage of the Wagner Labor Relations Act was brought about by the irrefutable conclusion that working men are not protected under the strict *laissez faire* economics that were accepted as being applicable to businessmen, but rather that the individual working men must be protected by permitting and encouraging combination. The individual worker was helpless.

The passage of the Wagner Labor Relations Act adds force to our contention that the Anti-trust laws should be construed as the framers intended, namely, that it did not apply to labor.

In effect, the first section of the Wagner Labor Relations Act states the public policy of the United States—which includes the economic policy—that the refusal of employers to accept the procedure of collective bargaining leads to industrial strife and unrest, which has the necessary effect of burdening or obstructing commerce.

The Section concludes with the statement it is the United States' policy to eliminate or mitigate obstructions to the free flow of commerce by encouraging the practice of collective bargaining. Section 8, Subsection 3 provides that nothing in that statute or *in any other statute of the United States* shall preclude an employer from signing a closed

shop agreement. Accordingly, Congress by these sections intended to avoid any application by a Court of the Anti-trust laws for the purpose of preventing labor organizations from carrying out *these* goals.

Yet to declare labor subject to the provisions of the Anti-trust laws may raise a serious conflict between the Sherman Act and the Wagner Act.

Our contention that the Anti-trust laws do not belong to apply to labor results in more complete harmonization of the entire Federal statutory structure.

Thus, as above discussed, and many other examples could be cited, the provisions of the Anti-trust laws are inconsistent with the policies and provisions of the Federal Wagner Labor Relations Act and the Norris-La Guardia Act. To hold that the Anti-trust laws are applicable to the labor organizations seriously impairs the expressed policy and the implied goal of Federal legislation designed to help labor organizations.

#### IV.

**The indictment does not charge a violation of the Sherman Act as it has been construed and interpreted by this Court.**

Under this heading, we urge that the indictment does not state facts sufficient to support the charge of a crime against the United States of America under the Sherman Act.

A. If the Sherman Act is not applicable to labor unions and their activities, then the defendants cannot be indicted under this particular statute for causing a restraint of trade.

If the Sherman Act is not to be applied in the criminal prosecution of labor unions then the indictment must fall. The indictment charges that the defendant labor union and

labor union officials conspired with other persons to violate the Sherman Act. If the Sherman Act does not permit the prosecution of labor union officials, i.e., if under the Sherman Act labor union officials cannot be prosecuted for causing restraints of interstate commerce, then it does not make any difference that other individuals may so be prosecuted. We emphasize our contention by repeating: The Federal Congress has indicated that, in so far as the anti-trust laws are concerned, the labor unions and labor union officials are not subject to prosecution for restraints of interstate commerce. This does not mean that we are contending that the Sherman Act "gives" an immunity to labor unions. On the contrary, our contention is that the Sherman Act does not create a new obligation or responsibility so far as labor unions or their officials are concerned. Ofttimes, argument has been made that labor unions have claimed the protection of the Sherman Act in order to avoid prosecution or obligation. This argument is unsound. Labor simply claims that the Federal Sherman Act does not impose additional or new obligations on labor unions or their officials.

If the Sherman Act cannot be used as a basis of prosecuting labor unions or labor union officials, does it mean that we are contending that labor unions or labor union officials can avail themselves of their economic and social nature and, therefore, lend themselves to the purposes of those who are subject to the Sherman Act? Assuredly not. If a labor union official becomes an employee or the head of a giant trust, combination or monopoly, does the fact that he has previously been elected to the office of a labor union official serve him a defense to a prosecution for violation of the Sherman Act based upon his status or capacity as such employee or head of a giant business trust? It does not. The salient fact is that as soon as the so-called

labor union official begins to act in a capacity *other* than his social and economic status as such union official, he is acting within the territory circumscribed by the provisions of the Sherman Act, and is, of course, subject to punishment therefor. But, so long as he is carrying on a labor union activity, he cannot be prosecuted under the Sherman Act—not because the Act *confers* immunity, but because the boundaries of the Act do not include him.

It may be argued by the Government that this contention may not be made under the charge in the indictment of a general conspiracy involving all defendants. But that does not answer our contention.

The indictment must not be judged by any isolated sentence or paragraph. The entire context must be considered by the Court in determining the status of the labor union and the officials of the labor union, who are named as defendants in these indictments. First of all, the union is designated as an unincorporated association; the individuals are named as officers of the union. It is shown in one portion of the indictment that they refused to take in as members certain applicants—drivers of milk wagons.

It is also alleged that Leslie Goudie, President of the Joint Council, advised the union and its officers in various activities; it is further alleged that Leslie Goudie, through the instrumentality of the Joint Council, prevented the delivery of daily supplies of groceries and other food products by members of the unions affiliated with the Council to places of business served by independent distributors who refused to purchase fluid milk at the prices fixed by the alleged conspiracy.

Under these allegations we have a complete picture of union activities. Regardless whether these activities are legal or illegal, they are all within the province and purview

of the functions of unions. On that basis, we contend that labor unions are not subject to prosecution under the Sherman Anti-Trust Act.

We must distinguish a labor union stepping out of the sphere of its normal functions, such as a labor union engaging in banking or other commercial activities. We do not claim that it is not possible for a union to depart from its normal activities and engage in general business activities, thus bringing it before the Court as another individual engaged in the claimed wrongful activities. However, it is our contention that a labor union, when engaged in the activities for which it is organized—even though it resorts to illegal means—is exempt from the Anti-Trust laws. There may be other statutes and other laws which provide adequate punishment, but they cannot be punished under the Anti-Trust laws, because their activities, regardless whether the same restrains trade or commerce, are not included within the Act.

B. Even assuming the Sherman Act were applicable to the facts charged in the indictment, the allegations of Counts 1 and 2 as to the fixing of prices is a reasonable restraint of trade by labor unions within the meaning of the decisions of this court construing the statute.

Directing our attention to counts 1 and 2, which charged a conspiracy to fix prices to be paid to the producers and by distributors, respectively, is such a charge of participation by a labor union in the price fixing of the commodity concerning which the union members offer their labor, a violation of the Sherman Anti-Trust Act?

In the case of *Appalachian Coals v. United States*, 288 U. S. 344 (1933), this Court in an opinion by Mr. Chief Justice Hughes definitely recognized that the Sherman Act

does not condemn all restraints, and does not condemn restraints which may eliminate competition among the parties to an agreement (288 U. S., 360-361). This Court said that only where the public interests are prejudiced by an undue restriction of competition or undue obstruction of the course of trade can it be said that the Sherman Act is being violated (288 U. S. 360). (Citing exhaustively from the authorities.) This Court emphasized that, in applying the test,

"... a close and objective scrutiny of particular conditions and purposes is necessary in each case. Realities must dominate the judgment.... It is, therefore, necessary in this instance to consider the economic conditions peculiar to the coal industry...." (288 U. S. 360-361).

The same test should be applied to the facts alleged in the indictment concerning the labor union and its activities.

As a matter of economics, would it be unreasonable for a union to participate in the fixing of prices of the product "handled" by the members of a labor union?

This Court has, in the case of *United States v. Trenton Potteries*, 273 U. S. 392 (1926), struck down price-fixing agreements on the ground that they are in restraint of trade and violation of the Sherman Act (273 U. S. 399-401). But that is price fixing by competitors. At the expense of repetition, but in accordance with history and fact, we again state, labor and capital do not stand on the same footing. All reasonable-minded persons agree that a healthy society is premised upon a high standard of living for the working man. Economists agree that there is a high correlation between the prices paid by the consumer for the finished product and the wages paid to those whose labor enters into the production of such product. The defendant unions

cannot obtain the desired wage for its members unless the price paid by the consumer is sufficient to enable the employer to pay such rate to the working man. This is a question of economics. If there is a conflict in economic theory, at the very least the union has reasonable grounds to maintain such a position. There is no such great divergence between conflicting economic theories that should warrant a Court in deciding that the Sherman Act adopted one theory of economics and rejected another. This question of conflicting economic theories should be left to the proper jurisdiction for economic competition, namely, the industrial and business world. In other words, we urge that, if there is any restraint of trade resulting from an attempt by a labor union to fix the prices of its product, it is a reasonable restraint within the meaning of the rationale of *Appalachian Coals v. United States*.

In the case of *National Association of Window Glass Manufacturers v. United States*, 263 U. S. 403 (1923) this court applied the "rule of reason" in a case involving a labor union. There, as charged in the indictment in the case at bar, the unions entered into an agreement with the employers which limited the production, the operation, increased prices and the like. Yet this court unanimously, in an opinion by Mr. Justice Holmes, held that such an agreement was not prohibited by the Sherman Act, on the ground that the economics of the situation justified the arrangement between the unions and the employers even though it was national in scope. This case is squarely in point insofar as justifying the defendant union insofar as the charges of Counts I and II are concerned. This case makes it clear: the economics of the situation must be considered.

To the same effect, see the dissenting opinion of Justice Brandeis, in *Bedford Stone Co. v. Journeyman's Association*, 274 U. S. 37, at 58, (1927).

The laws of economics offer ample social justification for activities by unions in fixing of prices to the consumer provided that the purpose of such fixing of prices is to raise wages of the union working man. The legislative debates and the passage of both the Sherman Act of 1890 and Section 6 of the Clayton Act of 1914 recognized such economic justification. The legislatures recognized that labor does stand on a different footing than capital, and that accordingly labor should be exempted from legislation that tends to prohibit price fixing by other kinds of organizations. In other words if the purpose of the unions and its officials was to protect or better the working conditions of the union working man, then the charges in Counts I and II do not amount to a charge of a crime under the Sherman Act.

It is true that there is no evidence at the present stage of the case, but the indictment does not charge that the union participated in the fixing of prices that were unreasonable to the consumer, nor does it in any way negative the undoubted conclusion that the activities of the union and its officials in the case at bar were carried out in attempting to protect and better working conditions of its members.

Under such a view of the case, it is respectfully suggested that the price fixing comes within the so-called reasonable restraints of trade which are permitted under the most recent decisions of this Court. Unless this court adopts a rule that price fixing by labor unions is a violation *per se* under the Sherman Act, then Counts I and II do not charge a crime within the meaning of the Sherman Act in so far as the defendant union and its officials are concerned.

The court should also distinguish between the several different kinds of overt acts alleged in the indictment.

For example, the charges in Counts I, II and IV that the defendant union and its officials participated in a conspiracy to violate the Sherman Act by denying membership in Local 753 to duly qualified drivers in employ of certain independent distributors. It is the law that the union being a voluntary association may prescribe such rules for admission to membership as it sees fit and that no individual who is excluded thereby has ground for claiming that such exclusion is illegal. This is conclusively established by the leading case of *Pickett v. Walsh*, 192 Mass. 572 at page 583, 78 N. E. 753 (1906).

In the case of *Kemp v. Division Amalgamated Association, Etc.*, 255 Ill. 213, (1912), the Illinois Supreme Court recognized the right of labor unions to make their own rules for admission to membership and to work with whomsoever they saw. 255 Ill. at 227.

For other cases holding in substance that unions can make their rules concerning the terms upon which they will work for other individuals see *Barker Painting Company v. Brotherhood of Painters*, 23 Fed. (2d) 743, 745 (1927); *Rambusch v. Brotherhood of Painters*, 105 Fed. 2d 134 (1939), (certiorari denied by Supreme Court of United States October, 1939).

C. Even assuming the Sherman Act is applicable to labor unions or their activities, the facts charged in the indictment do not show a direct, substantial or unreasonable restraint of interstate commerce or trade by the defendants within the meaning of the decisions of this court.

The problems of (1) interstate commerce and (2) the restraints that are prohibited by the Sherman Act are being discussed at length in the briefs of other defendants.

In addition to such presentation, the defendants in this brief state that this court has several times held that unions

are not violating the Sherman Act unless there is a restraint on interstate commerce, and unless such restraint is substantial, direct and unreasonable.

*United Mine Workers v. Coronado Coal Co.*, 259 U. S. 344, 403, 407-408 (1922).

*United Leather Workers v. Herkert Co.*, 265 U. S. 457, 471 (1924).

*Levering & Co. v. Morrin*, 289 U. S. 103, 107 (1933).

An examination of the indictment does not disclose facts which show the union guilty of causing a direct, substantial and unreasonable restraint of commerce within the meaning of the aforesaid cases.

The case of *Highland Farms v. Agnew*, 300 U. S. 608, 615-616 (1937) decides that sale of milk by a dairy within a state is not a sale in interstate commerce even though the dairy purchased the milk in bottled form outside the state. The union in Chicago was not "directly" burdening interstate commerce:

## V.

Under Section 8 of the Sherman Act, a labor union being a voluntary, unincorporated association is not a legal entity, and cannot be indicted for an alleged criminal violation of Section 1 of the Sherman Act.

A Federal Grand Jury sitting in Illinois could not properly indict a voluntary unincorporated association as Milk Wagon Drivers' Union, Local 753, because under the substantive law of Illinois such voluntary unincorporated association was not a legal entity and therefore had no legal capacity to be indicted within the meaning of Section 8 of the Sherman Act.

The Government will probably not dispute the fundamental proposition of law that a voluntary unincorporated association is not by the common law a legal entity, and is not therefore a person in law. Hence, unless authorized by statute a voluntary unincorporated association as such has no legal capacity to sue or be sued. There is no "it."

*Moffat Tunnel League v. United States*, 289 U. S.

113, 118 (1933) and also see various cases therein cited.

4 Am. Juris 485, Sect. 46.

63 Corpus Juris 703, Sect. 91.

5 Corpus Juris 1369, Sect. 118.

7 Corpus Juris Sect. 43, Sect. 17.

The Illinois case of *Cahill v. Plumbers' Union*, 238 Ill. App. 123, at Page 127 (1925) recognizes the common law rule to the effect that a trade union being a voluntary unincorporated association could not be sued at law as an entity, i.e., in its association name, all of its members must be named and sued as defendants.

The question is whether under Section 8 of the Sherman Act considered by this Court in *United Mine Workers v. Coronado Coal Co.*, 259 U. S. 344 (1922) and *Brown v. United States*, 276 U. S. 134 (1928) can a voluntary unincorporated association such as a trade union be indicted by Federal Grand Jury in Illinois for an alleged violation of criminal provisions of the Sherman Act?

In the first place, we contend that the decision whether a trade union possesses the requisite legal capacity to be indicted is a question that must be governed by the law of the "situs," i.e., Illinois.

Under the decisions of this Court in *Erie Railroad v. Tompkins*, 304 U. S. 64 (1938) and *Ruhlin v. New York Life Insurance Company*, 304 U. S. 202 (1938), it is sub-

mitted that the general question of the legal capacity of a defendant to be indicted for a crime is a question of the substantive law of the State, and that the Federal Courts are bound to follow the substantive law of the State.

In the case of *Ruhlin v. New York Life Insurance Company*, 304 U. S. 202, this Court said:

"The parties and the Federal Courts must now search for and apply the entire body of substantive law governing *an identical action* in the State Courts." 304 U. S. at page 209 (Italics ours).

It cannot be disputed that under an identical action in the State of Illinois the Courts would there hold that a trade union, not being a person recognized by law, could not be indicted. *Cahill v. Plumbers' Union*, 238 Ill. App. 123.

The question of legal capacity is a question of the substantive law of Illinois. The provisions of Section 8 of the Sherman Act logically should not govern such substantive law. In *Panko v. Endicott Johnson Corporation*, 24 Fed. Supp. 678, (1938), the Court accepts without any questioning the defendant's contention that capacity to sue must be determined by the law of the State of New York and not by the law of the Federal Courts sitting in New York.

It has been similarly held that the question of capacity to sue in the Federal District Court within the meaning of 28 U. S. C. A. Sect. 725 is governed by the State law of the District in which the Federal Court is located.

*Texas and Pacific Railway v. Humble*, 97 Fed. 837 (Affirmed 181 U. S. 57) (1901).

*Johnson v. City of St. Louis*, 172 Fed. 31 (1909).

*New York Evening Post v. Chalnor*, 265 Fed. 204 (certiorari dismissed 262 U. S. 59).

Second, even assuming that the principle in *Erie Railroad v. Tompkins*, 304 U. S. 64 (1938) is not applicable, we then contend that the decisions in the *United Mine Workers v. Coronado Coal Co.*, 259 U. S. 344 (1922) and *Brown v. United States*, 276 U. S. 134 (1928) are not applicable to the case at bar.

The decision in the *Coronado Coal* case is analyzed and examined at length by Prof. Edward W. Warren in "Corporate Advantages without Incorporation" (1929) Chap. IX, Pages 648 to 669.

Was Local 753 an association existing under the laws of either the United States or of any State? In Illinois it has been held that a labor union cannot be incorporated under the Illinois statutes pertaining to corporations not for profit. *People ex rel. Padula v. Hughes*, 296 Ill. App. 587 (1938).

The opinion of the Attorney General of Illinois is to the effect that a labor union may not be incorporated under the Business Corporation Act, i.e., corporations for profit. See 1937 Opinions of the Attorney General of Illinois, p. 78, No. 1035.

It is submitted that Local 753 was neither existing under or authorized by the "laws" of the state of Illinois. As a matter of law "it" could not so exist as an entity.

This Court in the case of *Moffat Tunnel League v. United States*, 289 U. S. 113, 118 (1932) recognized that voluntary unincorporated associations which were organized for the purpose of developing commercial interests and adequate transportation facilities, in the one case made up of individuals and in the other case made up of clubs, towns and irrigation companies, were not "organized pursuant to or recognized by any law." This Court recognized that in the absence of action by the Legisla-

ture, i.e., by the sovereign power, there was no legal personality. 289 U. S. at 118. It is a fundamental proposition that

"the Courts should not treat any body of men as a legal unit without the consent of the Sovereign."

Prof Edward W. Warren in "Corporate Advantages without Incorporation," at Page 8, and many decisions there cited.

The words of Section 8 of the Sherman Act do not create legal entities. Neither do the *United Mine Workers v. Coronado Coal Co.*, 249 U. S. 344 (1922) and *Brown v. United States*, 276 U. S. 134 (1928) hold that Section 8 of the Sherman Act indicated Congressional intent to create legal entities.

In the opinion by Mr. Chief Justice Taft in the case of *United Mine Workers v. Coronado Coal Co.*, 259 U. S. 344 (1922) after referring to the numerous state statutes concerning trade unions, the Chief Justice pointed out that the question of suability of trade unions is:

"\* \* \* after all in essence and principle merely a procedural matter." 259 U. S. at 390.

This Court, as the language quoted and the surrounding context indicates, was concerned simply with a "procedural" problem where under the substantive law the union members were liable to the plaintiff and where the members had voluntarily concentrated their strength in a self acting body "they may not be sued as this body and the funds they have accumulated may not be made to satisfy claims for injuries unlawfully caused in carrying out their united purpose." 259 U. S. at 390-391.

This Court did not intend to and did not in fact decide that a trade union was a legal entity or that Section 8 of the Sherman Act conferred upon them the attributes of

a legal entity. Entities are created by "corporation" statutes. The decision in the *Coronado* case did not attempt to change the essential nature of the voluntary unincorporated association.

Even assuming Section 8 of the Sherman Act creates procedural rights so that an association may be the object of certain proceedings under the Sherman Act, we contend that there is no intent expressed in the statute to confer such legal capacity upon the unincorporated voluntary association so that such association could be indicted and convicted for a criminal offense. Legal capacity to be subject to an indictment must be affirmatively designated by the act of the Sovereign. As we have shown *supra*, the Sovereign has not so acted.

In the case of *Ex parte Edelstein*, 30 Fed. (2d) 636 (C. C. A. 2, 1929) Judge Learned Hand pointed out that the *Coronado* case merely decided first, that the common funds of the union members were subject to a suit at law, and second, that individual liabilities of the union members could be enforced. He stated:

"We do not, therefore, think that there is even an intimation that the Supreme Court meant to change the doctrine that such associations are aggregations, the political status of whose members is as little enlarged as though they were partners in an ordinary commercial or industrial enterprise. Indeed, in the case of corporations themselves, in recent times the tendency has been rather to emphasize their aggregate character than their fictitious personality, an exotic in any case in English law." 30 Fed. (2d) at 638.

This Court has recognized the *aggregate nature* of unincorporated associations—as distinguished from the entity—even though the unincorporated association

1. was organized under the laws of a State (*Chapman v. Barney*, 129 U. S. 677)
2. was considered as a "quasi-corporation" (*Great Southern Co. v. Jones*, 177 U. S. 449)
3. was sitting as a Board of appointed officials with public duties. (*Thomas v. Trustees of Ohio State University*, 195 U. S. 207.)

Similarly in *United States and Cuba Corporation v. Lloyds*, 291 Fed. 889 (1923), Judge Learned Hand, then District Judge, stated that in the *Coronado* case this Court was interested in the questions whether union funds could be reached on execution—and that was all. 291 Fed. at Pages 891-892.

The mere recognition in Section 8 of the voluntary association as a body which may be proceeded against for *some* purposes does not result in the association's acquiring an entity. Otherwise consider the result of statutory recognition of procedure concerning "partnerships," "societies," "trusts," "estates," "firms," "committees," "companies," "two or more persons having a joint or common interest," "a body incorporate" and any "other unincorporated body of individuals." These groups have been recognized by statutes for various purposes substantially as Section 8 of the Sherman Act recognizes "associations." It cannot be contended that these "associations" have become legal entities.

#### What is meant by "laws" of Section 8?

We submit that that word means "statutes."

In the ordinary use of language, "laws" means statutory laws. If all rules and regulations governing the human conduct be meant, the appropriate expression is "the law," not "laws." This association is not included,

then, because it does not exist under, nor is it authorized to exist by, any statute.

In the second place, of what is "existing under or authorized by" descriptive—of "associations" only, or of "corporations" also?

A natural reading of the statute indicates that the words are descriptive of both. If so, is there a difference between a corporation "existing under or authorized by" the laws of a state, and one "organized under" those laws? It would seem not. Logically these words should not have any different meaning when applied to "associations." The only possible difference is that the expression "organized under" connotes an affirmative statute which grants privilege or powers, upon compliance therewith, while the expression "existing under or authorized by" connotes a passive, declaratory statute, which merely states, in effect, that which has been lawful shall continue to be so. If the two expressions be essentially the same, then only those associations have been given an entity which have acquired, by statute, a quasi-corporate existence. The trade union being a voluntary unincorporated association has no such quasi-corporate existence.

In addition, in the *Coronado* case, the opinion strongly relies on the existence of the Federal statute permitting the incorporation of trade unions as national unions by the Act of Congress approved June 29, 1886, c. 567, 24 Stat. 86. It may be argued that the sovereign intended to confer "legal personality" on unions by this incorporation act.

But this latter statute was repealed in 1932. See 47 Stat. 741; Act approved July 22, 1932, c. 524. The sovereign's intent no longer exists.

In the case of *Edward Hines Trustees v. State*, 130 Miss. 348, 94 So. 231 (1922) it was held that an unincor-

porated association could not be indicted for a crime—there is no "it."

7 C. J. Sec. 43, Sect. 17.

We respectfully urge that an unincorporated association is not a legal entity under Section 8 of the Sherman Act, and therefore does not possess "legal capacity" to be indicted.

**CONCLUSION.**

Defendants Robert G. Fitchie, James G. Kennedy, Steve C. Sumner, Fred Dahms, F. Ray Bryant, John O'Connor, and David H. Riskind urge that the ruling of the District Court sustaining these defendants' demurrer to the indictment be sustained for the various "common" questions of law urged by the various other defendants and the particular reasons urged in this brief.

Respectfully submitted,

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NOV 13 1939

CHARLES ELMORE GROPLEY  
CLERKIN THE  
**Supreme Court of the United States**

OCTOBER TERM, 1939

**No. 397****UNITED STATES OF AMERICA,***Appellant,**vs.***THE BORDEN COMPANY, ET AL.,**APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR  
THE NORTHERN DISTRICT OF ILLINOIS, EASTERN DIVISION.**BRIEF FOR THE BORDEN COMPANY, BOWMAN DAIRY  
COMPANY, CAPITOL DAIRY COMPANY AND  
CERTAIN INDIVIDUAL DEFENDANTS.**

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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1939

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No. 397

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UNITED STATES OF AMERICA,

*Appellant,*

*vs.*

THE BORDEN COMPANY, *et al.*

---

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR  
THE NORTHERN DISTRICT OF ILLINOIS, EASTERN DIVISION

---

## BRIEF FOR THE BORDEN COMPANY AND OTHERS

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### SUMMARY OF ARGUMENT

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#### I.

If, as the Government contends, the decision and judgment of the District Court were based upon a construction of the Sherman Act within the meaning of the Criminal Appeals Act of March 2, 1907, these defendants have a right to urge, in support of the judgment of the trial court, grounds going to the construction and validity of the Sherman Act which are based upon the record, even though some of such grounds were not relied upon by the District Court.

## II.

The Capper-Volstead Act has removed from the purview of the Sherman Act, and placed under the primary jurisdiction of the Secretary of Agriculture, combinations, contracts and agreements of dairymen's cooperative associations for the marketing of milk.

The terms and legislative history of the Capper-Volstead Act indicate that it was intended by such Act to grant to farmers exemption from the operation of the Sherman Act in cooperatively marketing their products.

The combinations, contracts and agreements charged in the indictment involve the cooperative marketing of the products of the Pure Milk Association, a dairymen's cooperative, and since it is lawful for the Pure Milk Association to enter into said combinations, contracts and agreements, it was lawful for these defendants to become parties thereto.

## III.

Regardless of whether the Capper-Volstead Act exempts either the Pure Milk Association or these defendants from the operation of the Sherman Act with respect to the particular matters described in the indictment, said Act gives to agricultural cooperative associations broad powers to engage in restraints and monopolies of interstate trade which would not have been lawful for them under the Sherman Act. If the same acts are not lawful for others, the Capper-Volstead Act has so amended the Sherman Act or modified its operation that it discriminates against others in favor of farmers.

Such discrimination is arbitrary and unreasonable and it therefore amounts to a denial to these defendants of due process of law in contravention of the Fifth Amendment.

**IV.**

Count Two of the indictment, as construed by the District Court, charges that the defendants fixed and maintained prices for the sale of fluid milk by distributors to consumers in the City of Chicago.

The indictment shows that prior to the sale by distributors to consumers, the milk had ceased to move in interstate commerce by coming to rest within the State of Illinois at plants where it was pasteurized, bottled and otherwise handled by the distributors.

Count Two does not charge that the defendants intended to restrain interstate commerce by fixing retail prices in Chicago, nor does it show facts from which such an intent can be presumed.

What effect, if any, the fixing of retail prices in Chicago had upon the interstate movement of milk was therefore indirect and remote.

**V.**

Count Four charges that the defendants imposed the base-surplus plan of production upon the Chicago milk shed. The base-surplus plan is not a limitation upon the production or supply of milk, but merely a plan to equalize seasonal production.

Even if the base-surplus plan may have had some effect upon the quantity of milk moving in interstate commerce to Chicago, such effect was remote and indirect only.

## ARGUMENT

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### I.

**THE DEFENDANTS IN AN APPEAL BY THE GOVERNMENT  
UNDER SECTION 682 OF TITLE 18, U. S. C. A., ENTITLED, "THE  
CRIMINAL APPEALS ACT OF MARCH 2, 1907" MAY URGE IN  
SUPPORT OF THE JUDGMENT OF THE DISTRICT COURT NOT  
ONLY THE REASONS UPON WHICH SAID COURT RELIED BUT  
ANY GROUNDS BASED UPON THE RECORD WHICH GO TO  
THE VALIDITY OR CONSTRUCTION OF THE STATUTE UPON  
WHICH THE INDICTMENT WAS FOUNDED.**

If the Court decides that it has jurisdiction of this appeal under Section 682 of Title 18, U. S. C. A., entitled "The Criminal Appeals Act of March 2, 1907," it will necessarily be because the Court finds that the decision of the District Court dismissing the indictment herein was based upon the "construction of the statute upon which the indictment is founded." To sustain the judgment of the District Court these defendants rely not only upon the reasons given by that court for its judgment but also upon other grounds going to the construction and validity of the statute upon which the indictment is founded,

The District Court, having specified, among the many grounds of demurrer presented by the various defendants, two grounds sufficient in themselves to dispose of Counts One, Two and Four of the indictment, found it unnecessary thoroughly to consider the various additional grounds presented by the defendants. This is illustrated by the language of the District Court in its opinion (R. 112), where that court said:

"It will be perceived, however, from what has been stated, that as to Counts One, Two and Four of the indictment it is unnecessary to decide whether or not the allegations of the indictment show that interstate commerce was or was not restrained."

Acknowledging the lack of necessity for considering them thoroughly, the trial court, in the judgment order of July 28, 1939 (R. 114-118) overruled *pro forma* the grounds raised by the demurrers and motions to quash upon which he was not relying (R. 117). Doubtless the court below would not have disposed of them so perfunctorily had he not realized that upon an appeal to this Court under the Criminal Appeals Act this Court would examine not only the grounds upon which he based his judgment but all other grounds raised by the demurrers and motions to quash which go to the construction or validity of the statute upon which the indictment is founded.

These defendants, by their demurrers and motions to quash, challenged Counts One, Two and Four of the indictment (Count Three is not before this Court for consideration), upon the grounds, among others:

- (1) That said indictment and each count thereof does not aver or set forth any facts nor allege or charge the commission of any acts constituting an offense against the United States of America;
- (2) That said indictment fails to allege facts sufficient to show an unlawful combination and conspiracy under Section 1 of the Sherman Act;
- (3) That Counts Two and Four of the indictment fail to state facts sufficient to show that the acts therein charged directly affected interstate trade and commerce in milk; and
- (4) That the Sherman Act has been so modified by the Capper-Volstead Act as to render it unconstitutional and to deny to these defendants due process of law. (R. 34-40, 42-50.)

Each of said grounds of attack upon the indictment involves the "construction of the statute upon which the indictment is founded" to the same extent, although in a

somewhat different manner, as the grounds upon which the District Court dismissed the indictment. The last of said grounds also goes to the validity of the statute upon which the indictment is founded.

It is settled that a determination of whether the acts charged in an indictment under the Sherman Act involve or affect interstate commerce is a construction of the Sherman Act within the meaning of the Criminal Appeals Act. In *United States v. Patten*, 226 U. S. 525, it was urged by the defendants that running a corner in cotton did not in any way affect interstate commerce and hence was not condemned by the Sherman Act. The trial court so held and upon appeal by the government to this Court under the Criminal Appeals Act the jurisdiction of this Court was challenged upon the ground that no question of construction of the statute was involved. This Court held, however, that the trial court could not have decided as it did that the acts charged were not within the condemnation of the statute without first ascertaining what the statute condemned, which of course involved its construction. (p. 535).

In *United States v. Curtiss-Wright Corp.*, 299 U. S. 304, this Court entertained an appeal under the Criminal Appeals Act from a district court judgment quashing an indictment for conspiracy to violate a Joint Resolution of Congress and a Presidential proclamation made thereunder. The defendants demurred to the indictments on the grounds, first: that the Joint Resolution effected an invalid delegation of legislative power to the executive; second: that the Joint Resolution never became effective because of the failure of the President to find essential jurisdictional facts; and third: that a second proclamation operated to put an end to the alleged liability under the Joint Resolution. The court below sustained the demurrers upon the first point but overruled them on the

second and third points (p. 314.) This Court held that the point relied upon by the trial court was not well taken (pp. 314-329). The defendants contended, however, that the judgment of the trial court was correct on the other grounds asserted by them. The government contended that under the Criminal Appeals Act the jurisdiction of this Court did not extend to the questions decided in favor of the United States by the trial court. This Court overruled the government's contention and held that it was open to it to inquire whether or not the judgment could be sustained upon the grounds rejected by the trial court. It held that the principle followed in *Langnes v. Green*, 282 U. S. 531, that in other types of appeals the party prevailing below might urge in this Court a ground in support of the judgment which the lower court had rejected, was applicable in appeals under the Criminal Appeals Act (pp. 329, 330). Other decisions of this Court follow the same general rule. *United States v. American Railway Express Co.*, 265 U. S. 425; *Indiana Farmers Guide Publishing Co. v. Prairie Farmer Publishing Co.*, 293 U. S. 268; *Morley Company v. Maryland Casualty Co.*, 300 U. S. 185.

Under the same principle the defendants in this case are not restricted to the grounds relied upon by the district court herein.

The only limitation which this Court has announced upon its power to consider the whole record in an appeal under the Criminal Appeals Act, once it has accepted jurisdiction of a case thereunder, is that it cannot consider questions which relate to the construction of the indictment and its sufficiency merely as a pleading. *United States v. Carter*, 231 U. S. 492; *United States v. Hastings*, 296 U. S. 188. None of the points hereinafter argued by these defendants relates to the construction

of the indictment or its sufficiency merely as a pleading. Each of the points here urged involves the construction or validity of the statute upon which the indictment is founded and was either relied upon by the District Court in its decision or overruled *pro forma*.

## II.

### **THE CAPPER-VOLSTEAD ACT AUTHORIZES THE CONTRACTS AND AGREEMENTS COMPLAINED OF IN COUNTS ONE, TWO AND FOUR OF THE INDICTMENT AND WITHDRAWS THE SUBJECT MATTER OF THOSE COUNTS FROM THE PURVIEW OF THE SHERMAN ACT.**

The District Court dismissed the indictment on the ground that the marketing of agricultural products, including milk, has been removed from the purview of the Sherman Act and that the primary jurisdiction to terminate any practices in the marketing of such products which works disadvantage to the consuming public is in the Secretary of Agriculture. The Court based its decision on a series of acts of Congress, including the Capper-Volstead Act of February 18, 1922,\* and the Agricultural Adjustment Act of May 12, 1933, as amended and re-enacted by the Agricultural Marketing Agreement Act of 1937.\*\*

These defendants do not ignore or fail to place reliance upon the provisions of the Agricultural Adjustment Act as amended, to which the Government addresses a substantial portion of its argument. That Act emphasizes the conclusion which we contend is to be drawn in the first instance from the provision of the Capper-Volstead Act, that Congress intended to vest solely in the Secretary of Agriculture whatever supervisory power over interstate commerce in agricultural products it deems necessary.

\* 7 U. S. C. A. 291, 292; 42 Stat. 388.

\*\* 7 U. S. C. A. 601 *et seq.*; 50 Stat. 246.

The Agricultural Adjustment Act also demonstrates the kind of marketing plans which Congress deems essential to the successful administration of agricultural economy. However, the brief filed herein by other defendants treats fully of the terms and effect of the Agricultural Adjustment Act, making it unnecessary to consider the same subject in this brief. These defendants desire to argue here the proposition that the Capper-Volstead Act supports and justifies the decision of the district court by authorizing and removing from the purview of the Sherman Act and placing under the exclusive original jurisdiction of the Secretary of Agriculture the contracts and agreements described in the indictment.

It should be observed, before we undertake to discuss fully the terms and effect of the Capper-Volstead Act, that it does not follow, as the Government claims, that because the anti-trust laws have been suspended with respect to the marketing of agricultural products, persons normally engaged in the production, handling and marketing of such products may lawfully engage in every kind of restraint of trade. It may be conceded for the purpose of argument that if producers, processors or handlers of agricultural products should engage in a conspiracy in restraint of trade which bore no reasonable relationship to the marketing of such product, they would be subject to the Sherman Act. However, the district court has construed the indictment in this case as relating primarily to the relationship between producers and distributors of milk and has held that it is only by means of such relationship that interstate commerce is involved in the case at all. The Court stated (R. 105):

*"Counts I, II and IV . . . deal with the relationship between the producer and distributor of fluid milk. That relationship is the only basis upon which the government predicates the theory that interstate-commerce in fluid milk exists whereby a conspiracy*

under the Sherman Act may be charged. In substance these counts charge that the defendants engaged in a combination and conspiracy to restrain trade and commerce in fluid milk among the several states (1) by fixing and maintaining prices to be paid to producers; (2) by fixing and maintaining prices to be charged by distributors to consumers; and (3) by restraining, limiting, and controlling the supply of fluid milk moving in interstate commerce by means of what is known as the base surplus plan. *Price fixing is the essence of these counts.*"\*

We may therefore lay aside as futile any further discussion as to the possible application of the Sherman Act if this case involved something other than the marketing of an agricultural product in interstate commerce.

The Capper-Volstead Act provides:

Sec. 1. "That . . . dairymen . . . may act together in associations . . . in collectively marketing . . . products of persons so engaged. Such associations may have marketing agencies in common; and such associations and their members may make the necessary contracts and agreements to effect such purposes . . ."

The application of this Act to the facts pleaded in the indictment raises two questions: (1) What acts, contracts and agreements of dairymen and dairymen's cooperatives are authorized by this Act? (2) What is the effect of the Act on the liability of others, not dairymen, but with whom dairymen and dairymen's cooperatives make contracts and agreements?

The second problem can be disposed of summarily. If associations of dairymen are authorized to enter into contracts and combinations with others necessary for collective marketing of their products, it must be lawful for such others to enter into those contracts with such associations. Otherwise, the right given the dairymen and their exemption from the purview of the anti-trust

\* Italics ours throughout brief unless otherwise stated.

laws would be meaningless or could be exercised only by inducing others to violate the laws. The contracts and agreements described in Counts One, Two and Four of the indictment are contracts and agreements with the Pure Milk Association, a dairymen's cooperative, concerning the collective marketing of milk. It is specifically alleged in each count that the Pure Milk Association was a party to the contracts and agreements complained of. If the Pure Milk Association is authorized by the Capper-Volstead Act to make these contracts and agreements, these defendants cannot be said to have violated the Sherman Act in becoming parties thereto.

The fact that the Pure Milk Association is authorized by the Capper-Volstead Act to enter into the contracts and agreements described in the indictment, though not susceptible to the same summary treatment, is nonetheless clearly demonstrable. The court below stated that price fixing is the essence of these counts, and further stated (R. 105):

*"This Act (the Capper-Volstead Act) legalized price fixing for those within its purview. To that extent it modifies the Sherman Act. It removes from the Sherman Act those organizations, cooperative in their nature, which come within the purview of the Capper-Volstead Act."*

The holding of the District Court was obviously correct, as we shall proceed to demonstrate.

By Section 1 of the Capper-Volstead Act, farmers, without limitation as to their number or as to the amount of any agricultural commodity which they control or as to the extent to which they are otherwise in competition with each other, are empowered to "act together \*\*\* in collectively processing, preparing for market, handling and marketing" their products, and to "make the necessary contracts and agreements to effect such purposes." In the exercise of those powers it is necessary that such

associations enter into contracts for the sale to others of the products of their members. Contracts of sale must fix selling prices, and hence it follows that such associations or their common marketing agencies, to the extent to which they may control the supply of any agricultural commodity (and no limit is imposed as to that), are authorized to fix the market prices by agreement with persons not mentioned in the Capper-Volstead Act.

That Congress contemplated that restraints of trade and monopolies, theretofore illegal, would be the natural result of the rights granted to farmers under the Capper-Volstead Act, and intended not only to legalize such restraints and monopolies and thus to relax the anti-trust laws, but also vest in the Secretary of Agriculture primary jurisdiction to prevent injury to the public by reason thereof, are conclusions which flow irresistibly from the provisions of Section 2 of the Act. This Section provides:

"If the Secretary of Agriculture shall have reason to believe that any such association monopolizes or restrains trade in interstate or foreign commerce to such an extent that the price of any agricultural product is unduly enhanced by reason thereof, he shall serve upon such association a complaint stating his charge in that respect, . . . ."

It is further provided that a hearing shall be had on such a complaint, and that if the Secretary finds that such association monopolizes or restrains trade in interstate or foreign commerce to such an extent that the price of any agricultural product is unduly enhanced thereby, he shall issue a cease and desist order. Only thereafter is the matter to be referred to the courts, where the enforcement of the Secretary's order is to be undertaken by the Department of Justice.

That it was the purpose of Congress, in enacting the Capper-Volstead Act, to withdraw the combinations, contracts and agreements of producers of agricultural prod-

ucts from the purview of the Sherman Act, is apparent from the discussions in the House of Representatives and in the Senate during the debates preceding its enactment. Such discussions clearly show that the Act was intended not only to grant to farmers the right to combine in bargaining units which would have substantial equality of bargaining power with business corporations, but also to encourage and protect farmers in making full use of such rights by assuring them complete immunity from prosecution by the Department of Justice under the Sherman Act. It was recognized repeatedly during the debates that the powers granted by Section 1 of the Capper-Volstead Act would authorize farmers to engage in all kinds of restraints of interstate commerce in agricultural products, including the fixing and raising of prices paid by handlers to producers and of resale prices to be charged by handlers to consumers. It was recognized that the exercise of such powers would authorize monopolies in farm products. All of such powers were considered necessary to enable farmers to achieve parity of prices with industry in order to remedy the depressed condition of agriculture which existed at that time. Senator Walsh, then Chairman of the Senate Judiciary Committee, advocated an amendment to the Act which would have eliminated Section 2 and inserted a provision in Section 1 that none of the powers therein granted could be exercised to bring about a monopoly. The Senator expressly stated that he intended thereby to give farmers complete immunity from Section 1 of the Sherman Act but to leave them subject to Section 2 thereof. His proposed amendment was defeated in the Senate and Section 2 of the Capper-Volstead Act in its present form was restored. The debates show that it was the intention to substitute the Secretary of Agriculture for the Department of Justice as the law enforcing agency with respect to farm products, thereby making the Secretary of Agriculture a buffer be-

tween the farmers and the possibility of any criminal prosecution under the anti-trust laws.

We have abstracted from the Congressional Record pertinent passages from the debates upon the Capper-Volstead Act as Appendix C to this brief. They fully bear out all of the statements above made concerning the intention of Congress and show that the excerpts from the Congressional Record set forth in the Government's brief do not fully disclose the trend of the discussions.

The construction of the Capper-Volstead Act which we have shown is required by its terms and was intended by Congress, has been adopted by the Attorney General of the United States in the following opinion:

"Section 1 of the Capper-Volstead Act relates to producers acting together in associations, corporate or otherwise, 'in collectively processing, preparing for market, handling and marketing in interstate and foreign commerce, such products of persons so engaged' . . . . Its object was primarily to insure cooperative associations that qualified thereunder immunity from prosecution under the said Anti-Trust Laws." 36 Op: Atty. Gen. 33.

The Government takes the position that the Capper-Volstead Act merely "allowed farmers to combine for mutual benefit in the same way that individual stockholders are permitted to act together in a modern private commercial corporation" (Government Brief, p. 57). The fallacy in the Government's argument is that general incorporation laws have always been as available to farmers as to business men, subject always to the restrictions of the Sherman Act. No special legislation was needed to permit farmers to incorporate in the same manner as stockholders in an ordinary business corporation. We have shown that the purpose of the Capper-Volstead Act was to permit farmers to organize and act in a manner not available under general laws, to exempt them from the

Sherman Act, and to place them under the original jurisdiction of the Department of Agriculture instead of the Department of Justice.

The Government in its brief attempts to evolve a theory that Section 2 of the Capper-Volstead Act is aimed at evils which were beyond the reach of the Sherman Act, so that the fields covered by the remedial provisions of the two acts do not conflict or overlap. The Government states:

"The power given to the Secretary to protect the public against unduly enhanced prices resulting from farm co-operatives is similar to an anti-profiteering law. It opens up a field going far beyond the purview of the Sherman Act, to wit, direct government intervention in price policy in cases *where no other evidence of illegal combination exists*" (Government Brief, p. 59).

Directly contrary to the italicized words in the Government's argument, Section 2 of the Capper-Volstead Act authorizes the Secretary to act *only* where he finds that interstate trade has been restrained or monopolized. The existence of a condition which previously would have been a violation of the Sherman Act is a condition precedent to the operation of Section 2 of the Capper-Volstead Act. Far from occupying different fields, the two acts, by their terms, deal with the same things, viz., restraints and monopolies of interstate and foreign commerce. The difference between them is that under the Capper-Volstead Act a further condition must exist before the Secretary can act. It is not enough that there be a restraint or monopoly, but interstate trade must be restrained or monopolized "to such an extent that the price of any agricultural product is unduly enhanced."

The Government's argument continues:

"The Sherman Act itself has nothing directly to do with the reasonableness of prices. If a combination is not unreasonable in using its privileges to restrain trade, it is immaterial how high the prices go." (Government Brief, p. 59).

Thus the Government, in its efforts to show that the Capper-Volstead Act does not relate to the same subject matter as does the Sherman Act, takes the position that under the Sherman Act a combination or monopoly might be reasonable even though its purpose and effect were to fix and enhance prices. We submit that such a conclusion ignores the underlying purpose of the Sherman Act, which is not merely to prevent restraints and monopolies as an end in itself, but to prevent them to the end that the price of goods may be kept low by means of competition. In *Appalachian Coals, Inc. v. United States*, 288 U. S. 344, the criterion of reasonableness which this Court applied was the power to fix prices and not merely the existence of a combination among competitors. In *United States v. Trenton Potteries*, 273 U. S. 392, this Court, finding the combination there involved had fixed prices, held that fact so conclusive of its unreasonableness under the Sherman Act that the Court would not even inquire whether the prices fixed were reasonable.

The Government characterizes the district court's interpretation of the Capper-Volstead Act with attempted scorn in the following words:

"It is like saying that the passage of an anti-profiteering law prohibiting corporations from charging unreasonable prices licenses them to form cartels"

(Government Brief, p. 60).

We submit that the characterization falls short of its mark as sarcasm because it is a true summary of the effect of the Capper-Volstead Act. Section 2 of that Act is an anti-profiteering statute. By condemning only restraints and combinations of interstate trade which result in profiteering, it legalizes, when considered with the provisions of Section 1 of the same Act, combinations and restraints of trade among farmers which do not profiteer. A cartel is defined by Webster as:

"A combination of separate firms to maintain

prices above a competitive figure. It is the German equivalent of the American pool."

That is precisely the nature and purpose of the associations and combinations of associations which the Capper-Volstead Act contemplates.

We submit that, contrary to the Government's position, the following conclusions are inescapable: First, that both the Sherman Act and Section 2 of the Capper-Volstead Act deal with restraints and monopolies of interstate and foreign commerce; Second, that the differences between said statutes are, (a) that under the Sherman Act any form of combination to restrain trade or monopoly of trade which reduces competition or tends to fix or enhance prices is forbidden, while under Section 2 of the Capper-Volstead Act any form of combination to restrain trade or monopoly of trade is permitted, provided only that it does not unduly enhance prices; (b) that the remedial provisions of the Sherman Act contemplate a resort to the criminal courts by the Department of Justice in the first instance, while those of the Capper-Volstead Act contemplate an intermediate regulation by the Secretary of Agriculture in civil proceedings; Third, that unless the Capper-Volstead Act gives farmers the right to restrain and monopolize interstate trade in farm products in a manner and to an extent which would otherwise be a violation of the Sherman Act, its provisions are meaningless and fail utterly to accomplish the announced purposes of Congress in enacting it.

The fact that the indictment charges that the Pure Milk Association and the defendant distributors attempted to impose fixed prices and the base-surplus plan on so-called "independent" producers and distributors, cannot be relied upon to make out a violation of the Sherman Act. Such activities are within the purview of the Capper-Volstead Act. It has long been recognized that no

association of producers of agricultural products may effectively market their products or, for that matter, remain a factor in the market, unless they are able to control conditions throughout the market. There are included in Appendix B attached to this brief, statements of marketing experts and dairy economists, many of them high officials in the Department of Agriculture, amplifying this proposition.

However, it is unnecessary to give further consideration to this point in this brief in view of the holding of the District Court that the indictment does not show that the so-called "independent" producers and distributors are engaged in interstate commerce or that the milk produced or handled by them moved in or become part of interstate commerce. The concluding paragraph of the opinion below contains this statement (Record, p. 113):

"The indictment alleges generally the origin of fluid milk transported into Chicago from Illinois, Indiana, Michigan and Wisconsin. It further alleges that all the major distributors have country stations outside of Illinois and transport, or cause to be transported, milk received in such stations to Chicago. The indictment is lacking as to averments or allegations as to the origin of fluid milk sold by stores or independent distributors. It is only by intendment and inference that the Court could conclude from an examination of the indictment that the conspiracy charged in Count three had any effect on interstate commerce. It is only by such intendment and inference that the Court could conclude that the stores and independent distributors whose system of distribution the defendants are alleged to have controlled, sold fluid milk which was or had been the subject of interstate commerce. It is a fundamental of criminal pleading that an indictment must allege directly and with certainty every essential element or ingredient of the offense. If any essential element or ingredient of the crime is omitted, such omission cannot be supplied by intendment or implication. (*Pettibone v. U. S.*, 148 U. S. 197; *U. S. v. Carney*, 228 Fed. 163.)"

The language of the court quoted above had particular reference to Count Three of the indictment; however, all of the allegations in the indictment with reference to the origin and transportation of fluid milk for consumption in Chicago are contained in the first forty-six paragraphs thereof, preliminary to the charge of conspiracy in Count One, and are incorporated by reference thereto in each other count of the indictment. Consequently the conclusion of the trial court that the indictment fails to show the origin of the fluid milk sold by stores and "independent" distributors is equally applicable to all of the counts of the indictment. This court has held that it will not review the District Court's construction of an indictment. *United States v. Winslow*, 227 U. S. 202; *United States v. Pacific & Artic Ry. & Nav. Co.*, 228 U. S. 87; *United States v. Biggs*, 211 U. S. 507; *United States v. Patten*, 226 U. S. 525, 540.

It thus appears that any restraint or interference with production of milk by "independent" producers, or the transportation and sale of such milk in the City of Chicago by "independent" distributors or others, would not operate as a restraint of interstate commerce and would not be prohibited by the Sherman Act even if not authorized by the Capper-Volstead Act. The allegations contained in each count of the indictment with reference to the supposed acts of the Milk Dealers Bottle Exchange, the Milk Wagon Drivers' Union, a police officer, and three officers of the Health Department of the City of Chicago, which involved and affected only the business of "independent" producers and distributors, not shown to be engaged in interstate commerce, are likewise and for the same reason insufficient to bring the case within the purview of the Sherman Act.

All combinations, contracts and agreements for the

collective marketing of dairymen's products in interstate commerce having been withdrawn by the Capper-Volstead Act from the purview of the Sherman Act and placed within the exclusive original jurisdiction of the Department of Agriculture, the contracts and agreements set forth in the indictment may not be attacked on the ground that they are not "necessary contracts and agreements to effect" the purposes of the later Act. The determination of what contracts and agreements are necessary is a question of fact to be determined in the first instance by the producers whose marketing problems are involved. There is no allegation in the indictment that any of the contracts and agreements described were not necessary to the marketing of milk in Chicago and, in any event, the Secretary of Agriculture has original jurisdiction to determine if and when associations of dairymen exceed the limitations specified in the Act.

There is no doubt, however, that all of the contracts and agreements described in the indictment are not only germane to the subject matter of the marketing of milk, but are the kind of contracts that are necessary for that purpose. We assume that there can be no denial that the word "necessary" is used in the Capper-Volstad Act, as in other statutes, in the sense of "reasonably necessary and appropriate" rather than "indispensable". The District Court has stated that the defendants are charged (1) with "fixing and maintaining prices to be paid to producers"; (2) with "fixing and maintaining prices to be charged by distributors and consumers"; and (3) with "maintaining, limiting, and controlling the supply of fluid milk moving in interstate commerce by means of what is known as the Base-Surplus Plan". "Fixing and maintaining prices to be paid by distributors" is one step in the marketing of milk and in determining the prices which the producers thereof will receive. Unless the

Capper-Volstead Act authorizes the fixing of prices paid to producers by their customers, the Act is meaningless. "Fixing and maintaining prices to be charged by distributors to consumers" is another step in the same process. Obviously the process of marketing ends only when the milk reaches the consumer and the price which the producer can receive is always limited by the price which the consumer pays. "Restraining, limiting and controlling the supply of fluid milk" is still another step in the marketing thereof as contemplated by the Capper-Volstead Act. No program for the marketing of a product at enhanced prices can ignore the effect upon such prices of the law of supply and demand. Together, all of the contracts and agreements described in the indictment constituted a complete program for the marketing of milk in Chicago.

Conceivably the same milk could have been marketed in other ways, or a less comprehensive plan of marketing could have been agreed upon. However, we believe that the validity and legality of the marketing program agreed upon by the defendants in this case is sufficiently established by the fact that it is the kind of program which is widely used in the marketing of milk and has been advocated by the Government itself as a method of marketing peculiarly appropriate to milk. Of the 161 orders, marketing agreements and licenses promulgated or approved by the Secretary of Agriculture under the Agricultural Adjustment Acts and the Agricultural Marketing Act of 1937 which we have been able to examine, and which are listed in Appendix A attached to this brief, all provide for fixing uniform producer prices. Seventy-two fix uniform prices to consumers and one hundred twenty adopt the base-surplus plan. At the very time that the contracts and agreements complained of in the indictment are said to have been made, there was in effect in the Chicago market

a license issued by the Secretary of Agriculture which fixed uniform producer prices and imposed the base-surplus plan on both producers and distributors. Only twelve months prior thereto, the Secretary of Agriculture had imposed a license upon the producers and distributors in the Chicago milk shed which fixed both producer and consumer prices, and which also adopted the base-surplus plan.

There is appended to this brief as Appendix B a collection of opinions by dairy economists, marketing experts and recognized authorities in the field of co-operative marketing, many of them now high officials in the Department of Agriculture, the consensus of which recognizes and advocates the fixing of uniform producer and resale prices and the adoption of the base-surplus plan as essential to a stable market, without which there can be no successful collective marketing of dairymen's products.

It is respectfully submitted that from all of the reasons hereinbefore given it clearly appears that the Capper-Volstead Act, quite apart from the provisions of the Agricultural Adjustment Act and the Agricultural Marketing Act, fully justifies the conclusions reached by the District Court and requires that its judgment dismissing the indictment herein as to these defendants be affirmed.

### III.

**THE SHERMAN ACT HAS BEEN SO AMENDED, ALTERED, MODIFIED AND RESTRICTED BY THE CAPPER-VOLSTEAD ACT AS TO RENDER IT UNCONSTITUTIONAL AND TO DENY TO THESE DEFENDANTS DUE PROCESS OF LAW, IN CONTRAVENTION OF THE FIFTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES.**

The district court in this case found that the defendant, Pure Milk Association, an agricultural cooperative association, was by reason of the Capper-Volstead Act exempt from the Sherman Act with respect to the acts charged in

the indictment. We have argued under Point II hereof that the district court was correct in that conclusion and that it necessarily follows, under the construction which the district court placed upon the indictment, that these defendants were also exempt from the Sherman Act with respect to the violations charged in this case.

However, these defendants further contend that if it should be held that the Pure Milk Association is exempt, but that they are not exempt, the Sherman Act in its present operation is arbitrarily and unreasonably discriminatory as to them and deprives them of due process of law. These defendants further contend that the same result follows even if this Court should hold that the exemption of agricultural cooperative associations under the Capper-Volstead Act does not extend to the particular acts charged in the indictment herein. We believe it has been clearly shown that the sphere of action in which agricultural marketing associations are no longer subject to the Sherman Act is a very broad one and embraces monopolies and restraints of trade which the Sherman Act formerly condemned. We submit that such restraints and monopolies are unquestionably legal for farmers under the Capper-Volstead Act and that if they remain illegal for others under the Sherman Act there arises a discrimination against such others. It remains only to determine whether such discrimination is so arbitrary and unreasonable as to deny to such others due process of law.\*

In *Connolly v. Union Sewer Pipe Co.*, 184 U. S. 540, this Court considered the validity of an Illinois anti-trust statute enacted in 1893. The statute prohibited monopolies and restraints of trade in broad terms and provided that

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\* Of course, if the Court should hold that with respect to the acts charged in the indictment herein these defendants, as well as the Pure Milk Association, are exempt from prosecution by reason of the Capper-Volstead Act, these defendants could not further argue the discriminatory effect of the Sherman Act in this case because they would not have been prejudiced thereby.

any violation of its provisions should be a misdemeanor. It further provided, however, that the act should not apply to agricultural products or livestock while in the hands of the producer or raiser. The Court observed that, so far as that statute was concerned, two or more agriculturalists or livestock raisers could combine to fix and control prices and to eliminate all competition among themselves or others in respect of their products or livestock in hand, but that exactly the same things, if done by others, constituted a public offense (pp. 556-557). The Court held that a state, in prescribing regulations for the conduct of trade, cannot divide those engaged in trade into classes and make criminals of one class if they do certain forbidden things, while allowing another and favored class engaged in the same domestic trade to do the same things with impunity. It held that such a statute is not a legitimate exercise of the power of classification, and that it rests upon no reasonable basis and is purely arbitrary (p. 563).

The effect of Section 9 of the Illinois Statute, as thus construed, was the same as the effect which we have shown must be given to the Capper-Volstead Act, namely, that farmers may combine to restrain trade in a manner which would be criminal if done by others.

It is true that the exemption afforded farmers by the Illinois Act was uncontrolled, while associations of farmers under the Capper-Volstead Act may be enjoined by the Secretary of Agriculture if they monopolize or restrain trade to such an extent that the price of any farm product is unduly enhanced, but, so far as criminal liability is concerned, the exemption is as unqualified in one statute as in another, and it was on the ground of exemption from *criminal* liability that the *Connolly* case was decided.

The *Connolly* case was followed in *United States v.*

*Armstrong* (D. C. Ind.), 265 Fed. 683, in passing upon the constitutionality of the Food Control Act of August 10, 1917, as amended October 22, 1919 (the Lever Act). That Act made it unlawful to waste, hoard or monopolize necessities, or to engage in any discriminatory, unfair, deceptive or wasteful practice, or to make any unreasonable rates or charges in dealing with necessities, or to limit the production or restrict the supply or distribution thereof. Several provisos exempted agricultural producers and their cooperative associations from the provisions of the Act. The court held that the case could not be differentiated from the *Connolly* case and that the classification contained therein was arbitrary and not natural or reasonable and was therefore repugnant to the due process clause of the Fifth Amendment (p. 693).

The same conclusion as to the unconstitutionality of the Lever Act was reached in *United States v. Yount*, (D. C. W. D. Pa.) 267 Fed. 861. In that case the court cited and quoted from the *Connolly* case. It observed that under the exemption afforded them by the Lever Act, farmers, dairymen, stockmen and other agriculturalists might form a gigantic combination utterly destructive of the purpose of the statute but within the sanction of its provisos, while the same acts committed by any other person not in the favored class would make him a criminal. It held that such classification was unjust and arbitrary in the extreme and that it violated both the letter and the spirit of the Fifth Amendment (p. 865).

In *Beatrice Creamery Co. v. Cline* (D. C. Colo.) 9 Fed. (2d) 176, the court held a Colorado anti-trust act unconstitutional under the doctrine of the *Connolly* case. The act had been passed in 1913. In 1923 Colorado passed an agricultural cooperative marketing act. Associations organized thereunder were given broad powers to

prepare for market and market the products of their members, and two or more such associations were authorized to have common marketing agencies. (Compare with Section 1 of the Capper-Volstead Act.)

The court quoted at length from the *Connolly* case and held that under the authority of that case the Colorado anti-trust act had been rendered unconstitutional by the subsequent passage of the Colorado agricultural cooperative marketing act by reason of the exemptions to farmers granted by the latter act.

The Kentucky Court of Appeals recognized and applied the doctrine of the *Connolly* case in *Commonwealth v. International Harvester Co.*, 131 Ky. 551; 115 S. W. 703, a case which later came to this Court on another point. In that case the state court had before it a Kentucky anti-trust statute enacted in 1890, which sweepingly condemned all pools, trusts and combinations, and a statute subsequently enacted in 1906 declaring it lawful for agricultural producers to pool their crops for the purpose of marketing them so as to obtain a higher price than they might by selling said crops separately. Those two statutes when considered in relation to each other were claimed by the defendant in that case to violate the equal protection of the laws clause of the Fourteenth Amendment.

To avoid the result that the 1906 Act was discriminatory in liberalizing the anti-trust statute of 1890 in favor of farmers, the court adopted the view that the effect of the later act was to confer upon all, and not upon farmers alone, the right to form pools. Three dissenting judges held the view that the 1906 act had rendered the 1890 anti-trust law unconstitutional under the doctrine of the *Connolly* case. Thus, while a majority of the judges of the Kentucky court found a way to distinguish the *Connolly* case and save the later legislation designed to aid farmers by

extending its benefits to all others; all of the judges of that court recognized that unless the discriminatory effect of the two statutes could be so eliminated, the *Connolly* case would condemn the earlier legislation.

The fact that the *Connolly* case was based on the equal protection of the laws clause of the Fourteenth Amendment, which applies only to state legislation, does not prevent the principle of that case from being applicable to Federal legislation subject only to the Fifth Amendment. Both in the *Armstrong* case and the *Yount* case, cited above, the courts held that the principle of the *Connolly* case controlled their decisions although in each case Federal legislation was involved and it was held unconstitutional under the Fifth Amendment. There may be some differences between the power of classification afforded the states under the Fourteenth Amendment and that afforded Congress under the Fifth Amendment, but it has never been held, and it must be admitted, that arbitrary and unreasonable classification is as much a denial of due process of law as of equal protection of the laws. In either case, it is not the mere fact of classification which renders legislation unconstitutional but the exercise of the power of classification in an arbitrary and unreasonable manner. For some legislative purposes farmers may doubtless be classified separately. It is the contention here, however, that the *Connolly* case and the cases which have followed it do not leave open to question the proposition that it is an arbitrary and unjust discrimination to compel some who engage in trade to remain subject to a criminal statute which forbids them, and once forbade all others, to monopolize or restrain such trade, when agricultural producers are not only permitted but encouraged by a subsequently enacted statute to do those very things.

It is therefore respectfully submitted that unless it be

held that the exemption from the operation of the Sherman Act extended to farmers under the Capper-Volstead Act is also extended to these defendants with respect to the acts described in the indictment herein, as construed by the district court, the Sherman Act has been so modified, altered and amended by the Capper-Volstead Act as to render it arbitrarily, unjustly and unreasonably discriminatory in its operation and to thereby deny to these defendants due process of law.

#### IV.

**THE SUPPOSED CONSPIRACY DESCRIBED IN COUNT TWO OF THE INDICTMENT "TO FIX AND MAINTAIN BY COMMON AND CONCERTED ACTION, UNIFORM, ARBITRARY AND NON-COMPETITIVE PRICES FOR THE SALE BY THE DISTRIBUTORS IN THE CITY OF CHICAGO OF FLUID MILK SHIPPED IN THE SAID CITY FROM THE STATES OF ILLINOIS, INDIANA, MICHIGAN AND WISCONSIN" DOES NOT AFFECT OR ONLY INDIRECTLY AFFECTS INTERSTATE COMMERCE.**

The gravamen of Count Two of the indictment is that the defendants fixed and maintained arbitrary and non-competitive prices for the sale of fluid milk in the City of Chicago. (R. 101.) Price fixing does not of itself violate the Sherman Act unless it involves a direct restraint of interstate commerce. It is maintained by these defendants that the acts charged in Count Two do not demonstrate such direct restraint as is required to state a crime upon a proper construction of Section 1 of the Sherman Act.

**A. Interstate Commerce Ceased upon the Delivery of the Milk, Previously Moving in Interstate Commerce, to the Plants of Distributors in the City of Chicago.**

It appears from the allegations of the indictment that fluid milk produced outside the State of Illinois and shipped into the State is delivered with milk produced within the State of Illinois "to a place, premise or establishment

where milk is collected preparatory to pasteurization elsewhere, or to a pasteurization plant where milk is handled and otherwise prepared for distribution and sale as fluid milk." (R. 3.) "Handling is pasteurizing and bottling fluid milk." (R. 2.) There is no allegation that the milk was destined to or did move beyond the State of Illinois after handling.

It is the contention of these defendants that interstate commerce ends when the milk is delivered to the pasteurization plant where it is commingled with milk produced within the state and pasteurized, cooled, bottled "and otherwise prepared for distribution and sale as fluid milk." (R. 3.) The situation is not unlike that described in *Atlantic Coast Line Railroad Co. v. Standard Oil Co.*, 275 U. S. 257, 267, which involved oil transported by boat to Florida. The oil was drained from the boats into storage tanks and was thereafter moved within the State of Florida by rail and by tank trucks to wholesale and retail dealers. It was there held that the interstate or foreign commerce in this oil ended upon its delivery to the plaintiff into the storage tanks or the storage tank cars at the seaboard, and that from there its distribution to storage tanks, tank cars, bulk stations and drive-in stations, or directly by tank wagons to customers, was intrastate commerce; that the reshipment of an interstate or foreign shipment does not necessarily establish a continuity of movement or prevent the shipment to a point within the same state from having an independent or intrastate character, even though it be in the same cars. The distribution of milk from the pasteurization plant is more clearly intrastate commerce than the distribution of oil involved in the *Atlantic Coast Line* case for two reasons —(1) the milk originating from without the State is commingled with milk produced within the State of Illinois; (2) the milk is put through a processing operation at the

pasteurization plant, including pasteurization, cooling, bottling "and otherwise prepared for distribution," which was lacking in the oil case.

The facts involved in the *Schechter Poultry Corp. v. United States*, 295 U. S. 495, are also comparable to those alleged in the indictment filed in this case. In that case poultry which had been purchased in interstate commerce was held to have finally come to rest within the state, upon delivery to the defendants for slaughtering. It was decided that when the poultry was trucked to the slaughter houses in Brooklyn the interstate aspect of the transaction ended; that no "current" or "flow" of interstate commerce continued to subject subsequent transactions to congressional regulation (p. 542); that the so-called "throat of commerce" cases were not applicable to a commodity which had come to rest within the state and was not destined for transportation to other states (p. 543).

A similar conclusion was reached in *Lipson v. Socony Vacuum* (C. C. A. 1), 76 F. (2d) 213, 218, in an action under the Clayton Act for treble damages, where it was held that interstate commerce in gasoline ended when it was received by defendants in Massachusetts for storage, and that sales and deliveries from storage thereafter made in Massachusetts to retail customers were sales in intrastate commerce.

The case of *H. P. Hood & Sons v. Commonwealth*, 235 Mass. 572, 127 N. E. 497, 499, involved the validity of a state income tax. The question presented was whether sales of fluid milk by the Hood Company in Boston were sales in interstate commerce when the milk had originated outside the state. The case is particularly apposite for the reason that the methods used by the Hood Company in processing and handling the milk, described in the opinion, are identical with those described in the indictment.

in this case. The court recognized that the part of the milk company's business which consisted of transporting the milk to Boston from states other than Massachusetts was clearly interstate commerce but that the "handling" at its plants closely resembled "manufacture" and every step thereafter in the sale of such milk was an intrastate affair, the income from which was subject to the taxing power of the commonwealth (p. 499).

It thus appears from analogous decisions that when milk produced outside the State is delivered to pasteurizing plants in the City of Chicago, where it is mixed with milk originating within the State, pasteurized, cooled, bottled, etc., interstate commerce is at an end and the distribution of the processed milk to the consumer is purely intrastate commerce.

The gas cases demonstrate how little is required to remove a commodity once traveling in interstate commerce from such commerce. In *Pennsylvania Gas Co. v. Public Service Commission*, 252 U. S. 23, it was held that the transportation and sale of natural gas produced in one state and then transported and furnished directly to the consumers in a city of another state, by means of pipelines from the source of supply, was interstate commerce, but that holding was overruled in *Missouri v. Kansas Gas Co.*, 265 U. S. 298, 308, and *East Ohio Gas Co. v. Tax Commission*, 283 U. S. 465, 471. These and similar cases have now established that if a pipeline company, engaged in interstate commerce, after receipt at its distribution plants, supplies gas to domestic consumers, that portion of its business which involves the delivery of the gas to the burner tips after reduction of pressure and delivery into the local mains is *intrastate* commerce and subject to State regulation. It is not necessary that there be any storage of gas, or that the movement of the gas in the mains be inter-

rupted. The interstate movement ends with the reduction of pressure and delivery of gas into the local mains.

The cases relied upon by these defendants and discussed in this brief demonstrate that interstate commerce ceased upon the delivery of the milk, previously moving in interstate commerce, to the plants of the distributors.

**B. The Regulation of Purely Intrastate Transactions in a Commodity is Only an Indirect and Remote Interference with Interstate Commerce.**

It may readily be seen that regulation of intrastate transactions in reference to a commodity which has an extra state origin may have a very real effect on the volume of local sales and indirectly upon the volume of interstate commerce in such community. The power of the several states to regulate local commerce has, however, never been denied except in so far as it is limited by the "equal protection" clause of the Fourteenth Amendment to the constitution. The cases hold that interference with interstate commerce after the interstate movement has ended is such a remote and indirect interference with interstate commerce that jurisdiction rests solely in the state where transactions took place. They may be classified as follows:

(1) *Price Fixing Cases.* It has been held that a state may fix the local retail price of gas previously transported in interstate commerce. *Public Utilities Comm'n v. Landon*, 249 U. S. 236, 245; *Missouri v. Kansas Gas Co.*, 265 U. S. 298, 308, 309; *Pennsylvania Gas Co. v. Public Service Commission*, 252 U. S. 23, 29. *Missouri v. Kansas Gas Co.* has been discussed on page 31 of this brief. *Public Utilities Commission v. Landon* was a case in which the receivers of an interstate gas company sought to enjoin the Public Utilities Commissions of Kansas and Missouri, certain municipalities and many local companies from interfering with the establishment and maintenance of rates for selling

gas to consumers. This Court held that regulation of the rates chargeable by local distributing companies had but an indirect effect upon the interstate business of the transporting and selling company, even though the interstate business consisted exclusively of selling the gas to the local companies. Further, it held that the lower court was in error in assuming that interstate commerce had not ceased when the gas passed into the local mains and that as a result of this termination of such commerce the power of the Public Service Commission to set the burner-tip price could not be denied.

(2) *Freight Rate Cases.* It has been held that the regulation of freight rates for a commodity which had previously moved in interstate commerce does not constitute a direct burden on interstate commerce. In *Gulf, Colorado & Santa Fe Ry. Co. v. Texas*, 204 U. S. 403, it was held that an interstate shipment, on reaching the point specified in the original contract of transportation, ceased to be an interstate shipment, and its further transportation to another point within the State on the order of the consignee was controlled by the law of the State, and not by the Interstate Commerce Act, and that the State, through its commerce commission, might properly set rates for the local transportation of the goods which had previously moved in interstate commerce.

See also the case of *Atlantic Coast Line Railroad Co. v. Standard Oil Co.*, 275 U. S. 257, previously discussed on page 29 of this brief, where the Court held that intrastate transportation of the oil after it had been unloaded from boats moving in interstate and foreign commerce should be governed by intrastate rates.

(3) *Tax Cases.* A State may impose an excise tax on gross receipts from income derived from the sale of goods previously moving in interstate commerce; or require the

payment of an occupational tax measured by the volume of such sales. The leading case on this subject is *East Ohio Gas Co. v. Tax Commission*, 283 U. S. 465, 470, 472, discussed *supra* in this brief. See also *Hart Refineries v. Harmon*, 278 U. S. 499, 501, where it was held that a State might tax the use as well as the sale of gasoline which had been imported into the State and had come to rest there. In the *Hart* case this Court, in discussing *Sonneborn Bros. v. Cureton*, 262 U. S. 506, decided that, interstate transportation having ended, the taxing power of the state over the commodity transported might, so far as the commerce clause of the Federal Constitution was concerned, be exerted in any way which the state's constitution and laws permitted provided, of course it did not discriminate against the commodity because of its extrastate origin.

See also *Hood & Sons v. Commonwealth*, 235 Mass. 572, 127 N. E. 497, discussed *supra*, in which a state income tax, measured by the volume of local sales of milk brought in from outside the State of Massachusetts, was held valid. Compare these cases with *Ozark Pipeline v. Monier*, 266 U. S. 555, in which a tax was held invalid because the business of the company was purely interstate.

The philosophy of each of the classes of cases cited above is the same. In each case where state regulation, state price fixing, or state taxation was permitted, interstate commerce had ceased and only intrastate commerce was directly involved. The effect on interstate commerce was indirect and remote.

*Indirect or remote restraint should not be confused with the actual effect of the restraint.* In the *Landon* case, the indirect restraint complained of was such as to completely destroy the interstate commerce involved. However, the court held that the restraint was nonetheless indirect and beyond the jurisdiction of the Federal Government. It is

not the degree of restraint, but whether it operates directly or indirectly upon interstate commerce that determines its legality.

Restraints, to be cognizable under the Sherman Act, must be direct and immediate. The cases cited above demonstrate that any interference with the distribution of goods originating outside of the state, after the interstate movement has ended, is an incidental, indirect and remote restraint of interstate commerce. The effect of fixing arbitrary and non-competitive prices for sales of milk in the City of Chicago may or may not affect the incentive to purchase. However, any incentive thus eliminated would not result in a direct burden on interstate commerce, and consequently, is not illegal under the Sherman Act. This proposition is conclusively demonstrated by numerous Supreme Court decisions, a few of which will be considered.

*Levering & Garrigues Co. v. Morrin*, 289 U. S. 103, involved a combination to unionize certain building operations by stopping work on the buildings. This resulted in the contractor discontinuing interstate shipments of materials. Interstate commerce was thus restrained, just as it is conceivable that local price fixing as alleged in the indictment might cause a diminution in interstate commerce in milk. The Supreme Court held that the incidental interference with the interstate movement of materials in the *Levering* case was not prohibited by the Sherman Act because *the sole aim of the conspiracy was to halt or suppress local building operations as a means of compelling the employment of union labor* and not for the purpose of affecting the sale or transit of materials in interstate commerce. That use of the materials was purely a local matter, and the suppression thereof the result of the pursuit of a purely local aim. *Restraint of interstate commerce was not an object of the conspiracy. Prevention of the*

*local use was in no sense a means adopted to effect such a restraint. It was this exclusively local aim, and not the fortuitous and incidental effect upon interstate commerce, which gave character to the conspiracy (p. 107).*

*Industrial Association of San Francisco v. United States*, 268 U. S. 64, involved facts similar to those in the last preceding case. The court found that there was no interference with the freedom of the outside manufacturer to sell and ship, or to the local contractor to buy. The process went no further than to take away the latter's opportunity to use and, therefore, his incentive to purchase. The court then decided that the effect upon, and interference with, interstate trade, if any, were clearly incidental, indirect and remote (p. 80).

**C. The Indictment Charges no Intent to Restrain Interstate Commerce and any Restraint Which May Have Been Caused by the Acts Charged is Only Incidental, Indirect and Remote and Not Such a Restraint as is Prohibited by the Sherman Act.**

It has thus far been demonstrated that the allegations of the indictment show that interstate commerce ceased upon the delivery of the milk previously moved in interstate commerce to the plants of the distributors in the City of Chicago. Further, that regulation of purely intra-state transactions in connection with a commodity, which had moved in interstate commerce but the movement having terminated, resulted only in an indirect and remote interference with such commerce not cognizable under the Sherman Act.

These defendants, however, recognize that a combination and conspiracy entirely local in nature may violate the provisions of the Sherman Act if the intended effect of the acts of the conspirators is to restrain interstate commerce. The existence of such intention to restrain interstate commerce may be specifically charged, or a presumption of

such intention may arise from the inherent nature of the means adopted to effectuate the conspiracy.

It is apparent from a careful study of the indictment that no specific intent to restrain interstate commerce is alleged. Consequently, if the activities of the defendants charged in Count Two of the indictment, which are specifically limited in operation to sales of milk entirely intra-state in nature "in the City of Chicago" (R. 17, 20), are to constitute a violation of the Sherman Act, it must be upon the ground that the means alleged to have been adopted by the defendants to effectuate the conspiracy, were such as to raise a presumption due to their inherent nature of an intent to restrain interstate commerce.

The distinction sought to be called to the attention of the court is, we feel, most clearly shown by a comparison of the cases of *Levering & Garrigues Company v. Morrin*, 289 U. S. 103, previously discussed herein, and *Bedford Company v. Stone Cutters' Assn.*, 274 U. S. 37. In the former case it was sought to unionize the local craftsmen performing labor entirely within the state where strikes had been called to achieve the announced purpose of the union leaders. The refusal to continue the work previously started, it was charged, caused a restraint of interstate commerce by stopping the use of various articles which were moving in interstate commerce. The opinion stated that "the sole aim of the conspiracy was to halt or suppress local building operations as a means of compelling the employment of union labor"; and further that "restraint of interstate commerce was not an object of the conspiracy, prevention of the local use was in no sense the means adopted to effect such a restraint" and that the restraint of such commerce was merely "fortuitous and incidental" and held that the resulting restraint was incidental, indirect and remote and therefore not within the anti-trust act (p. 107).

Into this same class of cases fall *United Mine Workers v. Coronado Coal Co.*, 259 U. S. 344; *United Leather Workers v. Herkert & Meisel Trunk Company*, 265 U. S. 457; *Industrial Association of San Francisco v. United States*, 268 U. S. 64, and many others.

On the other hand, in the *Bedford Stone* case, *supra*, the announced purpose of the conspiracy was to unionize the quarrymen employed in the Indiana quarries. The means adopted were strikes, which would paralyze building operations throughout the country outside of Indiana, thus limiting the sales of non-union cut stone and causing damage to the interstate commerce carried on by the sellers of such cut stone for the purpose of causing such cut stone sellers, through pressure caused by the loss of interstate markets, to capitulate and employ union labor at their Indiana quarries. It is clear in this case that the motive of the conspirators was "to unionize the cutters and carvers of stone from quarries" (p. 47) and further, that "the strikes were directed against the use of petitioner's product in other states with the plain design of suppressing or narrowing the interstate market". The conspirators unquestionably did not intend to restrain interstate commerce as an end in itself but they did intend this restraint as an essential step in the accomplishment of their designs and the success of the plan depended upon such result.

The type of case represented by the *Bedford Stone* case includes such cases as the second *Coronado* case, *Coronado Company v. United Mine Workers*, 268 U. S. 295; *United States v. Brims*, 272 U. S. 549; *Local 167 v. United States*, 291 U. S. 293; *Loewe v. Lawlor*, 208 U. S. 274; *Boyle v. United States*, 259 Fed. 803.

Where the acts of persons involved in a conspiracy are local in character but the intent is to restrain interstate commerce and the means employed are calculated to carry

that intent into effect, a violation of the anti-trust laws necessarily results. Interstate commerce is the direct object of the attack and the restraint of such commerce is the necessary consequence of the acts and the immediate end in view. The distinction between direct and indirect effects has been clearly recognized in the application of the Anti-trust Act. Where a combination or conspiracy is formed, with the intent to restrain interstate commerce or to monopolize any part of it, the violation of the statute is clear. But where the intent is absent, and the objectives are limited to intrastate activities, the fact that there may be an indirect effect upon interstate commerce does not subject the parties to the federal statute, notwithstanding its broad provisions. *Schechter Poultry Corp. v. United States*, 295 U. S. 495, 547. This same distinction was recognized in the case of *Carter v. Carter Coal Co.*, 298 U. S. 238, 304.

There being no charge in the indictment of a specific intent to restrain interstate commerce, the local character of the conspiracy charged in Count Two of the indictment can be construed to involve a restraint of interstate commerce prohibited by the Sherman Act, only if the means adopted demonstrate such a direct restraint as to raise a presumption of intent to obstruct such commerce.

The district court in its opinion found that the means charged in Count Two of the indictment, were set forth in paragraphs 65 to 74, inclusive. (R. 101.) It is apparent upon reading paragraphs 65 to 67, inclusive (R. 17, 18), that they state only activities of the same local nature as those less specifically described in paragraph 63.

Paragraph 68 (R. 18) states that the Pure Milk Association refused to sell milk to distributors who did not maintain the resale prices determined by the alleged conspirators. Even if the Pure Milk Association was dealing in interstate commerce in these

sales, which we submit it was not, the acts charged nevertheless seem entirely legal under the doctrine of *United States v. Colgate Co.*, 250 U. S. 300, which holds that the refusal to sell except to individuals who maintain resale prices, is perfectly legal. The trend of legislation to protect this right is illustrated by the Miller-Tydings Amendment to Section 1 of the Sherman Act and in Illinois, Wisconsin, Indiana and Michigan by state statutes approving resale price maintenance.

Paragraph 69 (R. 18) is merely a statement of the manner in which the particular prices were arbitrated in two instances.

The activities of the Bottle Exchange, set forth in paragraph 70 (R. 18), are of course purely local in nature and can by no stretch of the imagination be said to have had a direct effect upon interstate commerce.

Before commenting on paragraph 71 (R. 19), which contains allegations of the activities of Local 753, we wish to direct the attention of the court to the construction of the indictment contained in the opinion of the district court, wherein that court said, "the indictment is lacking as to averments or allegations as to the origin of fluid milk sold by stores or by independent distributors" (R. 113), and further, "it is only by such intendment or inference that the court could conclude that the stores and independent distributors whose system of distribution the defendants are alleged to have controlled, sold fluid milk which was or had been the subject of interstate commerce". (R. 113)

It is to be noted that by paragraph 11 of the indictment, an independent distributor is defined as any distributor other than a major distributor (R. 2); that by paragraph 10 of the indictment a major distributor is defined as any distributor named as a defendant in the indictment. (R. 2) Thus, it appears that any

direct interference with transportation of milk to distributors who refused to maintain prices fixed by the alleged conspirators, upon the interpretation of the indictment contained in the opinion of the district court, would be ~~also~~ interference with the transportation of milk, the origin of which is unknown. And, as said in that opinion, to assume that that milk was traveling in interstate commerce is to indulge in intendment and inference which has been condemned in criminal pleading in the case of *Pettibone v. United States*, 148 U. S. 197. Thus, it appears that the actual interference with transportation charged in paragraph 71 is, for aught that appears in the indictment, only an interference with local transportation of milk.

Paragraphs 72 and 73 (R. 19) merely set forth additional facts regarding the activities of the union and are important solely in showing the connection of Leslie G. Goudie and Daniel A. Gilbert with these activities; and show purely local actions.

Paragraph 74 (R. 20), setting forth the activities of the officials of the Board of Health of the City of Chicago, again charges acts which can only be said to involve interstate commerce by inference. For aught that appears in that paragraph read in the light of the other paragraphs of the indictment, and the interpretation of the indictment by the District Court, the activities there set forth affected only farms located within Illinois whose milk never travelled across state lines.

The conspiracy to set "arbitrary and non-competitive" prices being local in nature, did not state a crime cognizable under the Sherman Act. Only if the means adopted to effectuate the conspiracy were such as to fall within the regulatory power of the Federal congress under the commerce clause of the constitution could the conspiracy itself be so tainted by their illegality that it, too, would fall

within that power. We submit that, following the interpretation of the indictment found in the opinion of the District Court, the origin (from what state) of the milk sold to and transported to independent distributors who refused to maintain prices is not stated. This Court then must find that no means are stated which would render the otherwise local conspiracy subject to congressional regulation under the Sherman Act or any other Federal statute.

These defendants readily concede that the charges contained in Count Two of the indictment may well state a crime under the anti-trust laws of Illinois; but, as said in the case of *Addyston Pipe & Steel Co. v. United States*, 175 U. S. 211, 248,

"In brief, their right to combine . . . in their own state could not be reached by the Federal power derived from the commerce clause in the constitution."

We respectfully submit that the acts charged in Count Two of the indictment fail to show that they affected interstate commerce directly and that any effect they might have had upon interstate commerce was merely fortuitous and incidental. As no intent to restrain such commerce is charged or can be presumed the acts charged do not fall within the condemnation of the Sherman Act.

## V.

### **COUNT FOUR OF THE INDICTMENT FAILS TO STATE FACTS WHICH SHOW THAT THE BASE-SURPLUS PLAN RESTRAINS INTERSTATE COMMERCE.**

In Count Four the conspiracy charged is a combination among the various defendants to impose the base-surplus plan of production upon the Chicago Milk Shed, an area described in paragraphs 1-47 of the indictment. It is the contention of the government that the result of the base-surplus plan was to limit and reduce the supply of fluid milk

flowing in the channels of interstate commerce into the City of Chicago and that as a consequence the conspiracy to impose the plan on milk producers constituted a violation of the Sherman Act. It is the contention of the defendants that the base-surplus plan, as set forth in the count, could not have the effect of imposing any restraint on production and hence on interstate commerce in milk. It is the further contention of the defendants that, even conceding that the base-surplus plan might result in a diminution in the amount of milk produced, such restraint relates to production only and is too remote and indirect to come under the condemnation of the Act.

By way of preface, we ask the court's indulgence in referring briefly to the reasons and circumstances impelling the adoption of the base-surplus plan in the Chicago Milk Shed, reasons which apply with equal force to its adoption by the great majority of producers in the United States.

Prior to the time the base-surplus plan was adopted by farmer producers, the supply of milk in the Chicago Milk Shed was subject to wide seasonal variations. Substantially all the cows in the area were "freshened" in the spring of the year, resulting in a large surplus or "flush" of milk in the spring and summer months, which had a tendency to depress prices and demoralize the producer market, and an acute scarcity of milk in the late fall and winter months. The base-surplus plan in its operation pays the farmer a premium for stabilization of production. Thus a farmer, to hold his base, must at all times of the year within certain limits, maintain his production above designated minimum levels by having his cows "freshened" at different periods throughout the year, the converse result of which is to equalize the surplus produced beyond the base so that there is no vast over-production in some months and a corresponding under-production in others.

The plan was so successful in its operation that it was made an integral part of the licenses for milk issued by the Secretary of Agriculture for the Chicago Milk Shed during the period from August 1, 1933 until March 2, 1935, when the producers and distributors in that area operated under such licenses. It was thereafter retained in subsequent agreements between the Pure Milk Association and the distributors after March 2, 1935. It has also been incorporated in the majority of the milk licenses issued in other milk sheds throughout the country by the Secretary of Agriculture under the Agricultural Adjustment Act. The intent and actual operation of the plan was, and is not to restrain, but to equalize production.

#### **A. Count Four Fails to Demonstrate Any Restraint on Interstate Commerce.**

The restraint on which the government relies to sustain the Count is found in paragraph 99 (R. 29), in which it alleged that the defendants:

" \* \* \* pursuant to and in execution of said combination and conspiracy have contracted to buy and to sell and have bought and sold within said district large quantities of fluid milk produced on approved dairy farms located in the states of Illinois, Indiana, Michigan and Wisconsin, in accordance with the base surplus plan of production and payment aforesaid. The said base surplus plan of payment was intended to and does restrict, limit and control, restrain and obstruct the supply of fluid milk entering the City of Chicago by arbitrarily limiting the quantity of fluid milk for which a member producer may be paid the base price as aforesaid."

Supplementing this allegation are sub-paragraphs (a), (b), (c), (d) and (e) of paragraph 90 (ii), (R. 26), which describe in general terms the base-surplus plans. From an examination of this description of the plan it is plain that the restraint on which the government relies as the essence

of the conspiracy lies in the price differential between base and surplus milk, that is, that the farmer received one price for milk sold in Chicago as fluid milk and another for milk produced in excess of the fluid milk requirements of the distributors with which the Pure Milk Association had contracts. In paragraph 90 (ii) (e) the government states its reasons why such price differential would result in a diminution of production or supply and a consequent restraint on interstate commerce in milk. It is there stated that the differential in price between base and surplus milk had the effect of "diminishing initiative and economic incentive of member producers to produce on approved dairy farms and to offer for sale in the City of Chicago any fluid milk in excess of the amount prescribed as their base by the Pure Milk Association and the major distributors."

It is to be noted that the foregoing is the only language in the count from which it could be concluded that the base-surplus plan restrained interstate commerce.

That this statement represents a conclusion based on an invalid premise is apparent on analysis. It is nowhere contended in the count that farmers producing under the plan received less for milk sold by them as surplus milk than farmer producers not operating under the plan received for all milk produced by them—nor is it contended that the return to the farmer for surplus milk was below or so close to the cost of production as to render its production unprofitable. Unless these unwarranted assumptions are indulged no reason either by implication or necessary inference exists why the "initiative and economic incentive" of the farmer to produce milk would be diminished by operation of the plan. It is equally consistent to assume (as indeed is the fact) that the base price constitutes a premium price for milk in that category.

What differential existed between base and surplus milk or what the actual prices were from time to time paid for milk in various categories nowhere appears. In point of fact, both the prices paid and the "spread" have varied frequently during the time the plan has been in operation as new agreements have been entered into between the producers and distributors. Nor is the relation between prices paid for milk in various categories under the plan and those paid to producers not operating under the plan set out even by way of generality.

Actually prices obtained by the farmer for milk not produced under the plan vary widely depending on the market the farmer has for his product. If he has a fluid milk outlet he obtains one price; if he is compelled to sell to a condensery or cheese factory, another; if he separates the cream on the farm, feeds or sells the skim and ships the cream to market, still another. All of these factors, highly complicated by questions of outlet and supply, affect the relation between the prices from time to time determined for surplus milk under the base-surplus plan and the price the farmer might have obtained for such milk had it been sold on the open market.

The use of price as a criterion of legal or illegal conduct, when based on conjecture as to what factual situation would have obtained had prices been otherwise, has been condemned by the courts. Thus, in *International Harvester Co. v. Kentucky*, 234 U. S. 216, Justice Holmes held that to set a standard of legality dependent on questions of fluctuating and unstable prices was to set a standard beyond the reach of mankind (223).

In *United States v. Cohen Grocery Co.*, 255 U. S. 81, the court held unconstitutional the Lever Act (1919) in which it was made unlawful for any person "to make any

unjust or unreasonable rate or charge in handling or dealing in or with any necessities" or "to exact excessive prices for necessaries." The court held that an attempt to enforce such statute would be the exact equivalent of an effort to carry out a statute which in terms, merely penalized and punished all acts detrimental to the public interest when unjust and unreasonable in the estimation of the court and jury (p. 89).

Similarly, in *United States v. Trenton Potteries*, 273 U. S. 392, the court held that in the absence of express legislation they would not adopt a construction making the difference between legal and illegal conduct depend on whether prices were reasonable or not (398).

It is then submitted that no restraint on interstate commerce is implicit in the alleged conspiracy to impose the base-surplus plan on producers in the Chicago Milk Shed and that the count in alleging such agreement totally fails to show that the necessary or probable result of the combination charged would be a restraint on such commerce.

**B. The Unsupported Conclusion of a Restraint Shows Restraint (if any) of Production, Not of Commerce, and Any Effect That it Might Have on Commerce Would be Remote, Indirect and Secondary.**

Conceding for the sake of argument that the allegations of Count Four show a restraint on production (although the defendants vigorously insist that this is not true), nevertheless, such restraint would be insufficient to support a charge of violation of the Sherman Act. If the base-surplus plan could be said to impose a restraint, such restraint would, of necessity, be confined to a diminution of the supply of milk produced on the farms. It is not alleged that the effect or intent is totally to prevent production. The indictment states that in excess of 1,000,000 quarts of milk are sold daily in Chicago. But,

it is contended, the plan operates to reduce the supply of milk that would, except for such restraint, move to Chicago.

It has never been seriously contended that production is, *per se*, commerce, and amenable to Federal regulation. The true rule is found in *United Leather Workers International Union v. Herkert & M. Trunk Co.*, 265 U. S. 457, 471. In that case it appeared that the defendants conspired to unionize certain manufacturing ventures by preventing manufacturing operations. The means employed to stop operations included strikes, illegal picketing and intimidation. The result of the combination was to stop the stream of interstate commerce originating at the factories. It was stated in the opinion that the conspirators knew that the combination, if successful, would prevent interstate commerce. The court nevertheless there held that the restraint was not one prohibited by the Sherman Act.

Count Four neither shows nor charges a monopoly of supply, an attempt to control the price of the commodity after production and while in interstate commerce, nor any discrimination between would-be purchasers. It is not charged that the intent was to keep the milk out of interstate commerce when produced or that the intent to reduce production was ancillary and subordinate to an attempt to prevent its movement in commerce. It is alleged that the primary intent was to restrain production by means of the base-surplus plan—one incidental effect of which might be to reduce the milk moving in interstate commerce as in any case where production is limited. Such a restraint has consistently been held incidental, indirect and remote and not a violation of the Sherman Act.

In *United Mine Workers v. Coronado Coal Co.*, 259 U. S. 344, sometimes called "the first Coronado case", a conspiracy was formed to prevent the mining of coal. A large

percentage of the coal taken from the mines had previously moved in interstate commerce, and the result of the combination was to completely destroy such commerce. The court held that neither the combination nor the resulting restraint was prohibited by the Sherman Act.

In the instant case, we are not dealing with the fabrication of a manufactured article but the production on the farm of an agricultural commodity. The situation does not involve interstate commerce except in so far as a subsequent movement in interstate commerce might be affected by a failure to produce. The factual situation is thus essentially the same as that in the case of *United States v. Butler*, 297 U. S. 1, involving the validity of the Agricultural Adjustment Act of 1933, in which it was conceded, in both the majority and minority opinion, and almost without discussion, that the fact that an agricultural commodity might later move in interstate commerce did not give the Government jurisdiction over its production or make such production amenable to rules and regulations promulgated by the Secretary of Agriculture.

We submit that, even conceding that the base-surplus plan of production would, by its operation, involve a diminution of supply (which is denied), nevertheless such a reduction would not, under the charges of the indictment, constitute a restraint cognizable under the Sherman Act.

C. It Does Not Appear that if More Surplus Milk Were Produced Such Surplus Would be Available as and Sold as Fluid Milk in the Chicago Market.

It is nowhere charged that had more milk been produced by member producers of the Pure Milk Association, such excess milk would have moved in the channels of interstate commerce to the Chicago market. The statement in

paragraph 90(e) of the indictment, that the differential in price between base and surplus milk diminished *initiative and economic incentive* of member producers "to produce on approved dairy farms and to offer for sale in the City of Chicago any fluid milk in excess of the amount prescribed as their base by the Pure Milk Association and the major distributors" is far from such positive statement as is required to charge that such milk, if produced, would move in interstate commerce to the City of Chicago. It is equally possible to assume (as indeed is actually true of substantially all surplus milk produced under the base-surplus plan) that none of the theoretical additional surplus apparently anticipated by the Government, but for the plan, would be transported and offered for sale as fluid milk in the Chicago market. It is apparent that the Government makes the assumption that it would, but such assumption is far from the positive averment required to sustain the indictment against demurrer.

**D. The Means Stated Do Not Render the Combination Charged Illegal Under the Sherman Act.**

In the preceding sections of this heading we have dealt with what the defendants conceive to be the basis for the charge of conspiracy raised by the count, namely—a restraint on interstate commerce caused by the adoption of the base-surplus plan of production in agreements entered into between the Pure Milk Association and the so-called major distributors. We have demonstrated that the allegations of the count are not sufficient to show any restraint on interstate commerce by its operation and beyond that, that if by any inference or intendment the court could conclude that any restraint was implicit in its operation, such restraint was incidental, remote and not within the purview of the Sherman Act.

The ultimate object of the conspiracy charged not being

illegal under the Sherman Act, if the count is to be sustained the violation must be found in allegations of illegal means found in the count. That is to say, means illegal in themselves and independently calculated to restrain interstate commerce must be alleged to taint with illegality the alleged conspiracy to impose the base-surplus plan on the Chicago Milk Shed. Paragraphs 90 to 98 contain charges that the defendants did certain acts which for the purpose of this brief will be considered to constitute the means and methods by which the conspiracy charged was to be effected, since this interpretation was placed on them by the trial court, although it might well be contended that overt acts in pursuance of the alleged conspiracy are alone charged in these paragraphs. In paragraph 90, the Pure Milk Association is charged with the imposition of the base-surplus plan upon member producers, except for the allegations contained in sub-paragraph v, which will be considered later. In paragraph 91 the major distributors are charged with entering into agreements with the Pure Milk Association, imposing the base-surplus plan of production upon member producers and assisting the Pure Milk Association in building up and holding their membership. In paragraphs 92 to 98 the defendants, W. A. Wentworth, Leland Spencer, Associated Milk Dealers, Inc., the Bottle Exchange, Local 753, Leslie G. Goudie, Daniel A. Gilbert, Herman N. Bundesen, Paul Krueger and William J. Guerin are charged, in essence, with assisting the Pure Milk Association, in concert with the other defendants, in holding and building up its membership and imposing the base-surplus plan on milk producers in the Chicago area. With the possible exception of the charge contained in sub-paragraph iii of paragraph 95, which will be dealt with later, none of the means and methods alleged to have been adopted to effect this end were of and by themselves calculated to result in any restraint of inter-

state commerce in milk, and hence of themselves illegal under the Sherman Act, although certain of these acts might have been subject to prosecution by the appropriate local authorities. It is then submitted that (disregarding for the moment the subparagraphs above referred to) the object not being illegal under the Act, and the means of themselves not illegal thereunder, no basis exists under the charges contained in Count Four for sustaining this count of the indictment. In any conspiracy formed with an object not illegal in itself under the Sherman Act, such as compelling membership in the Pure Milk Association, Chicago Chamber of Commerce, or any other association, the means used to effect and coerce such membership cannot bring the conspirators under the Act unless the means themselves are illegal thereunder.

In subparagraph v of paragraph 90, and subparagraph iii of paragraph 95, it is charged that certain acts were done by the Pure Milk Association and Local 753 to hinder and prevent the transportation and delivery of fluid milk to the city of Chicago. It is, however, nowhere stated in the count that the milks so prevented from moving into Chicago by the acts of the defendants set forth in the foregoing subparagraphs, had an extra state origin and it is only by the widest use of intendment and inference that such an allegation could be supplied. In default of such direct allegation that the milk so prevented from moving to Chicago came from without the state, no means illegal under the Sherman act are stated in these subparagraphs and it is submitted that they, in common with the allegations of the alleged means found in the remaining paragraphs and subparagraphs of the count, form no basis for any prosecution under Section 1 of the Sherman Anti-trust Act.

For the reasons stated in the first division of this brief, this Court may and should consider the points herein urged in support of the judgment of the lower court dismissing the indictment; and the judgment should be affirmed.

Respectfully submitted,

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## APPENDIX A

Analysis of Milk Licenses, Orders and Agreements Promulgated and Approved by the Secretary of Agriculture under the Agricultural Adjustment Act, as amended.

Market	Type of Instrument	Effective Date
Arizona		
* Phoenix	License No. 91	11/10/34
Phoenix	Amended License No. 91	8/16/35
Tucson	License No. 99	4/16/35
California		
*† Alameda County	Agreement No. 22	11/ 7/33
*† Alameda County	License No. 16	11/14/33
*† Alameda County	License No. 63	7/ 1/34
*† Alameda County	Amended License No. 63	1/20/35
*† Los Angeles	Agreement No. 23	11/17/33
*† Los Angeles	License No. 17	11/20/33
*† Los Angeles	License No. 57	6/ 1/34
*† Los Angeles	Amended License No. 57	12/16/34
*† Los Angeles	Amended License No. 57	2/28/35
*† Los Angeles	Amendment to Amended License No. 57	3/28/35
*† San Diego	Agreement No. 31	12/15/33
*† San Diego	License No. 24	12/18/33
*† San Diego	License No. 98	2/ 1/35
*† San Diego	Amended License No. 98	6/19/35
*† San Francisco	License No. 89	10/ 2/34
Colorado		
Denver	License No. 85	9/ 1/34
Denver	Amended License No. 85	4/ 3/35
District of Columbia		
†D.C.	Order No. 11	9/21/36
Georgia		
* Atlanta	License No. 93	12/ 1/34
* Atlanta	Amended License No. 93	8/ 3/35
* Savannah	License No. 84	8/16/34
* Savannah	Amended License No. 84	10/15/34
* Savannah	Amended License No. 84	3/ 1/35
Illinois		
* Chicago	Agreement No. 1	8/ 1/33
* Chicago	License	8/ 1/33
* Chicago	License No. 30	6/ 1/34
* Southern Ill.	License No. 90	11/ 1/34
Indiana		
* Evansville	Agreement No. 18	10/23/33
* Evansville	License No. 12	10/23/33
* Evansville	License No. 34	2/26/34
* Evansville	Amended License No. 34	11/25/34
* Evansville	Amended License No. 34	7/24/35
Fort Wayne	License No. 64	7/ 1/34

\* Resale prices fixed.

† Base-surplus plan adopted.

Analysis of Milk Licenses, Orders and Agreements Promulgated and  
Approved by the Secretary of Agriculture under the  
Agricultural Adjustment Act, as amended

—Continued — Page 2

Market	Type of Instrument	Effective Date
<b>Indiana (continued)</b>		
Fort Wayne	Amended License No. 64	6/19/35
†Fort Wayne	Agreement No. 69	2/1/37
Fort Wayne	Order No. 32	10/15/38
Indianapolis	License No. 45	4/1/34
†La Porte Co.	Order No. 20	11/13/37
<b>Iowa</b>		
• Des Moines	Agreement No. 19	10/25/33
• Des Moines	License No. 13	10/28/33
• Des Moines	License No. 31	2/14/34
• Des Moines	Amended License No. 31	5/5/34
• Des Moines	Amended License No. 31	12/5/34
Dubuque	License No. 94	12/5/34
• Dubuque	Amended Order No. 12	6/16/39
Dubuque	Order No. 12	10/1/36
• Sioux City	License No. 43	3/17/34
• Sioux City	Amended License No. 43	5/16/34
Sioux City	Amended License No. 43	7/18/35
<b>Kansas</b>		
• †Leavenworth	License No. 56	5/16/34
• †Leavenworth	Amended License No. 56	12/16/34
• †Leavenworth	Amendment to Amended License No. 56	6/20/35
• Topeka	License No. 92	11/10/34
Topeka	Amendment to License No. 92	6/14/35
†Topeka	Amended License No. 92	7/16/35
†Topeka	Agreement No. 88	8/16/36
• †Wichita	License No. 44	3/17/34
• †Wichita	Amended License No. 44	5/16/34
• †Wichita	Amended License No. 44	8/18/34
• †Wichita	Amended License No. 44	1/21/35
†Wichita	Amended License No. 44	8/15/35
<b>Kentucky</b>		
• †Lexington	License No. 53	5/2/34
• †Lexington	Amended License No. 53	9/1/34
• †Louisville	License No. 60	6/1/34
†Louisville	Amended License No. 60	8/17/35
<b>Louisiana</b>		
• †New Orleans	Agreement No. 20	10/28/33
• †New Orleans	License No. 14	10/31/33
• New Orleans	License No. 42	3/17/34
<b>Maryland</b>		
• †Baltimore	Agreement No. 9	9/29/33
• †Baltimore	License No. 6	9/29/33
†Baltimore	License No. 80	8/1/34

\* Resale prices fixed.

† Base-surplus plan adopted.

Analysis of Milk Licenses, Orders and Agreements Promulgated and  
Approved by the Secretary of Agriculture under the  
Agricultural Adjustment Act, as amended

—Continued — Page 3

Market	Type of Instrument	Effective Date
<b>Massachusetts</b>		
Boston	Agreement No. 21	11/ 3/33
Boston	License No. 15	11/ 3/33
Boston	License No. 38	3/16/34
Boston	Amended License No. 38	2/24/35
Boston	Amended License No. 38	5/ 1/35
Boston	Amended License No. 38	7/16/35
Boston	Order No. 4	2/ 9/36
Fall River	Amended License No. 48	4/ 1/34
Fall River	Amended License No. 48	9/ 1/34
Fall River	Amended License No. 48	4/ 9/35
Fall River	Order No. 5	5/ 1/36
Lowell-Lawrence	Order No. 34	2/12/39
New Bedford	Amended License No. 49	4/ 1/34
New Bedford	Amended License No. 49	9/ 1/34
New Bedford	Amended License No. 49	4/ 6/35
<b>Michigan</b>		
Ann Arbor	License No. 65	7/ 1/34
Ann Arbor	Amended License No. 65	12/20/34
Ann Arbor	Amended License No. 65	5/ 1/35
Battle Creek	License No. 66	7/ 1/34
Battle Creek	Amended License No. 66	12/20/34
Bay City	License No. 67	7/ 1/34
Detroit	Agreement No. 4	8/27/33
Detroit	License No. 4	8/27/33
Detroit	License No. 50	4/ 1/34
Detroit	Amended License No. 50	11/ 5/34
Detroit	Amended License No. 50	5/ 6/35
Flint	License No. 68	7/ 1/34
Grand Rapids	License No. 69	7/ 1/34
Grand Rapids	Amended License No. 69	11/ 5/34
Grand Rapids	Amended License No. 69	5/ 1/35
Kalamazoo	License No. 70	7/ 1/34
Kalamazoo	Amended License No. 70	12/16/34
Kalamazoo	Amended License No. 70	5/ 1/35
Lansing	License No. 71	7/ 1/34
Lansing	Amended License No. 71	11/ 5/34
Muskegon	License No. 72	7/ 1/34
Muskegon	Amended License No. 72	11/ 5/34
Port Huron	License No. 73	7/ 1/34
Saginaw	License No. 74	7/ 1/34
<b>Minnesota</b>		
Twin City	Agreement No. 5	9/ 2/33
Twin City	License No. 5	9/ 2/33

\* Resale prices fixed.

† Base-surplus plan adopted.

Analysis of Milk Licenses, Orders and Agreements Promulgated and  
Approved by the Secretary of Agriculture under the  
Agricultural Adjustment Act, as amended

—Continued — Page 4

Market	Type of Instrument	Effective Date
<b>Missouri</b>		
*Kansas City	Amended License No. 40	4/ 1/34
*Kansas City	Amended License No. 40	5/16/34
*Kansas City	Order No. 13	12/ 1/36
*St. Louis	Agreement No. 24	11/22/33
*St. Louis	License No. 18	11/25/33
*St. Louis	License No. 35	3/ 2/34
*St. Louis	Amended License No. 35	6/ 1/34
*St. Louis	Amended License No. 35	8/14/34
St. Louis	Amended License No. 35	11/16/34
St. Louis	Amended License No. 35	3/ 4/35
St. Louis	Order No. 3	2/ 1/36
St. Louis	Amended Order No. 3	4/ 5/39
<b>Nebraska</b>		
*Lincoln	License No. 41	3/17/34
*Lincoln	Amended License No. 41	5/16/34
*Lincoln	Amended License No. 41	8/18/34
*Lincoln	Amended License No. 41	11/16/34
*Lincoln	Amended License No. 41	6/19/35
*Omaha—Council Bluffs	License No. 33	2/23/34
*Omaha—Council Bluffs	Amended License No. 33	6/ 1/34
*Omaha—Council Bluffs	Amended License No. 33	11/16/34
*Omaha—Council Bluffs	Order No. 35	4/ 5/39
<b>New York</b>		
New York	Order No. 27	9/ 1/38
<b>Ohio</b>		
Cincinnati	Order No. 22	5/ 1/38
Cincinnati	Amended Order No. 22	5/13/39
Toledo	Order No. 30	9/16/38
<b>Oklahoma</b>		
*Oklahoma City	License No. 62	6/16/34
*Oklahoma City	Amended License No. 62	9/ 4/34
*Tulsa	License No. 86	8/21/34
*Tulsa	Amended License No. 86	11/ 5/34
*Tulsa	Amended License No. 86	4/16/35
<b>Pennsylvania</b>		
*Philadelphia	Agreement No. 3	8/25/33
*Philadelphia	License No. 3	8/25/33
<b>Rhode Island</b>		
Newport	Amended License No. 47	4/ 1/34
Newport	Amended License No. 47	9/ 1/34
Newport	Amended License No. 47	8/16/35
*Providence	Amended License No. 46	4/ 1/34
*Providence	Amended License No. 46	9/ 1/34
*Providence	Amended License No. 46	10/ 1/34

\* Resale prices fixed.

† Base-surplus plan adopted.

Analysis of Milk Licenses, Orders and Agreements Promulgated and  
 Approved by the Secretary of Agriculture under the  
 Agricultural Adjustment Act, as amended

—Continued — Page 5

Market	Type of Instrument	Effective Date
Tennessee		
*↑Knoxville	Agreement No. 13	10 / 9/33
*↑Knoxville	License No. 10	10/28/33
Texas		
* Fort Worth	License No. 88	9 / 1/34
* Fort Worth	Amended License No. 88	11 / 5/34
†Fort Worth	Amended License No. 88	5/22/35
Virginia		
*↑Richmond	Agreement No. 32	12/20/33
*↑Richmond	License No. 25	12/20/33
*↑Richmond	License No. 52	5 / 1/34
*↑Richmond	Amended License No. 52	4/16/35
Quad Cities		
Illinois-Iowa		
* Quad Cities	License No. 58	6 / 1/34
*↑Quad Cities	Amended License No. 58	9 / 1/34
*↑Quad Cities	Amended License No. 58	2/26/35

- \* Resale prices fixed.
- † Base-surplus plan adopted.

## APPENDIX B.

**Opinions of Cooperative Marketing Experts and Dairy Economists Relating to Uniform Prices and Price Classification Plans for Cooperative Marketing of Milk.**

**Stability in Milk Markets, U. S. D. A., AAA, Marketing Information Series, DM-3, pp. 8-9.**

**Uniform Prices to Producers** "Establishment of a price which producers must receive for their product gives recognition to the fact that milk markets are stabilized only when the cost of milk is uniform among all distributors. Uniform buying price for a commodity like milk tends to improve competitive relations in the marketing area. It is a major step toward protection of farmers' milk markets against chaotic and drastically reduced prices and tends generally to maintain milk producers' prices on as high a level as is consistent with prevailing supply and demand conditions."

**The Relation of Cooperative Objectives to Agricultural Adjustment Administration Policies—E. W. Gaumnitz, Chief, Dairy Section of Agricultural Adjustment Administration, American Cooperation, 1937, pp. 416 et seq.**

**Control of Market by Cooperative** "In the case of cooperatives, rarely if ever have they had complete control of the supply of milk in the market. There is always a fairly large group, often in the minority but nevertheless of significance, which does not sell its milk through the cooperative. This minority element frequently is in a position to materially impede the program of the cooperative, regardless of whether the program is sound."

"Viewed in the light of the foregoing, it appears that the limitations to the achievement of the objectives of cooperatives and the policy of the Agricultural Adjustment Administration are largely the same as far as the practical aspects of marketing are concerned, even though the origin of such limitations is different. At the same time,

the marketing methods to be used in the achievement of the objectives are also decidedly similar."

"Marketing Act Utilizes Same Procedure."

"In this connection, consider the provisions of the Agricultural Adjustment Act relative to the fixing of prices and to prorating to producers the proceeds of sales to distributors. The act (recently amended by Uniform Prices to Producers the Agricultural Marketing Agreement Act of 1937) provides that the Secretary of Agriculture may enter into marketing agreements and issue orders:

"Classifying milk in accordance with the form in which or the purpose for which it is used, and fixing, or providing a method for fixing, minimum prices for each such use classification which all handlers shall pay, and the time when payments shall be made, for milk purchased from producers or associations of producers. Such prices shall be uniform as to all handlers, subject only to adjustments for (1) volume, market, and production differentials customarily applied by the handlers subject to such order, (2) the grade or quality of the milk purchased, and (3) the locations at which delivery of such milk, or any use classification thereof, is made to such handlers.

"The act also provided for the individual-distributor or market-wide pools, with or without rating.

*"Thus, not only are the fundamental objectives of the cooperatives and the policy of the Agricultural Adjustment Administration strikingly similar but also the marketing mechanisms which are authorized by the act in effectuation of the declared policy are much the same as the marketing mechanisms which cooperatives have developed during the last two or three decades."*

"Viewed in the light of the foregoing statements, it should be quite readily apparent that the Agricultural Adjustment Act is an effort by the federal government to apply the methods developed and proved sound by cooperatives over the entire market in markets where the federal government has jurisdiction, that is, where a material portion of the milk moves in interstate commerce."

**Inter-Association Management of Surplus by Cooperatives  
for Greater Stability of Market Conditions—T. G. Stitts,  
Agricultural Economist and Director of Dairy Research  
of the Farm Credit Administration, American Coopera-  
tion, 1937, pp. 457, et seq.**

"The cooperative association which bargains for the sale of fluid milk intelligently must study the opportunities available for it to maintain a satisfactory price level to its members and it is generally assumed that a stable market is necessary in order to accomplish this. While the term 'stable market' is a most general expression and there may be quite wide variations as to its exact meaning in any particular market, it is subject to rather definite implications.

"In accordance with the usual interpretations of the term it would appear that four conditions in particular are necessary for a stable market:

**Uniform Prices to Producers** 1. Uniform buying prices for fluid milk must be maintained in the country; that is, all dealers must pay the same price for milk in the market. Hauling costs, methods of pooling, and base rating plan are all involved in determining the cost of the milk to distributors.

**Uniform Prices to Consumer** 2. Resale price in the market must be on the same general level. In this connection there may be a spread between wagon delivered prices and store prices, but the general price of all distributors must be on approximately the same level for each class of trade.

**Control of Market by Cooperative** "When more than one association operates in a single market, the competition frequently results in unsatisfactory market conditions, widely fluctuating prices and general instability for the industry.

"There is no single solution for such conditions, but experience indicates that the cooperative should do all it can to prevent the organization of numerous associations in a single market by the maintenance of a price policy, equitable treatment of all members, and a carefully prepared educational program which will clearly set out the aims, objectives and policies of the cooperative."

**The Surplus Problem in the Fluid Milk Market—T. G. Stitts, Agricultural Economist, Director of Dairy Research of the Farm Credit Administration—American Cooperation, 1935, pp. 455, et seq.**

"Although there are numerous worthwhile functions that a cooperative can render its members for help to justify its existence and support, fundamentally there is no more competent service than to aid in holding a stable market. In order to do this the bargaining association must take the lead in the development and have accepted by as large a part Control of Market by Cooperative of the market as possible a workable program for the handling of the entire milk supply of its members."

" \* \* \* the primary objective of most bargaining cooperatives has been to provide a systematic, practical method for the handling and pricing of all classes of milk and to successfully administer whatever marketing scheme has been adopted. The full attainment of the ideals of the cooperative leads to a desire on the part of the organization for a control over a large proportion of the supply of milk reaching the market. The reason for this is quite obvious. Minorities which have remained outside of the association have frequently been responsible for ruthless competition and a general breakdown of the market. These small minorities have not entered into the general marketing scheme and have not carried their part of the surplus. 'Cheap milk' has been sold on the market because certain producers have not taken part in the general stabilization program."

"The efforts of the cooperative to attain control of a larger proportion of the market has lead to the belief that the milk association desired a monopoly of supply and expected to exact monopoly prices. It is monopoly only in the sense that the association needs to be in a position to prevent or check uncontrolled supply from developing ruthless competition and disorganization of the market."

**Classified Price Plans With and Without Base Set-Ups**  
**Walter Hunnicutt, Regional Milk Marketing Supervisor**  
**Agricultural Adjustment Administration, American Co-**  
**operation, 1936, pp. 188 et seq.**

"The primary purpose of use classification is to sell all of the available milk, and by pooling the proceeds determine the uniform price that shall be paid all **Uniform** producers in a market group for their milk. **Price to Producers** The necessity for uniform price to producers selling a given market has been repeatedly recognized in both state and federal milk legislation."

"An association pool represents the ideal in that no equalization or auditing is necessary. The association controls and merchandises the milk, collects from the dealer, pools the proceeds, and pays its own outlet sales blended price to its producers. Those markets that can operate on this basis with practically all producers in the association are most fortunate.

"But an association pool does not work well where its control through contract or ownership of the higher priced use outlets falls considerably short of its own supply outlets and of the entire supply and demand. In such cases, a few fluid milk distributors are apt to ignore the set-up and purchase their Class I requirements from independent producers, paying such producers a slightly higher price than the pool price paid by the association.

"This disparity between association pool and independent producer prices tends to discourage association membership and to build up an independent producer group caring nothing for the protection of the market as a whole, but primarily interested in individually securing a higher price than their cooperative association pool neighbors even though it enables their dealer to buy his fluid class requirements for less money. If the independent producer group grows, the exactations on the association pool and the burden of carrying the surplus becomes correspondingly greater and sooner or later it will have to be followed by either market wide pool, individual dealer pool or none at all.

"The only other solution of this problem is for the cooperative association pool to either increase its high use value sales or adjust its production to such sales and thus beat the non-cooperating producers at their own game. But this solution leaves the need for embracing all producers in the market in a common set-up still unsolved and gives too great an opportunity for unethical irresponsible dealers to drive down the price to their producers and use the resulting cheap milk to demoralize the resale market and in consequence the price to all producers."

• • • the primary justification for classified price plans is that *they enable producers to receive the same price for their milk and enable distributors to purchase their milk with each dealer paying the same price for each use.* The essential soundness of classified price plans in being fair to producers and fair to distributors and in encouraging a stable market cannot be ignored. The underlying principles of classified price plans should be better understood, especially by our courts.

**Uniform Price to Producers**

"It should be the objective of every cooperative association in the United States to educate their producers and distributors in the principles and methods for successful operation of classified price plans in order that when difficulty arises, the market may be so familiar with these principles and so convinced of their fairness that necessary improvements and adjustments may be made without disturbing the sound progress already achieved and so that the general public and the courts may recognize that classified price plans have long been in use; are fair; and necessary and that they meet with the approval of the great majority of producers and distributors in the particular market."

**F. F. Lininger of the Pennsylvania Agricultural Experiment Station, and F. P. Weaver—How to Adjust Milk Production to the Philadelphia Marketing Plan, Circular 123, Pennsylvania State College, pp. 3-4.**

"One of the serious problems for distributors of milk is the handling of the surplus above fluid sales. The total production of a milk shed during the early pasture season, unless artificially regulated, is generally much greater than production during the fall and winter when cows are largely barn-fed.

Base Surplus Plan "Realizing these facts, the 'basic-surplus' plan of selling was adopted in the Philadelphia area in 1919. The object of the plan was to give the farmers an additional incentive to curtail summer production and to increase production during the fall and winter, by paying them a higher price throughout the year for the 'basic' amount of milk than for the surplus above this amount.

"Prior to use of this plan, distributors were compelled frequently to go outside of the milk shed, in the fall, to obtain sufficient milk to supply the fluid demand, while during the spring and early summer there was a large surplus above that required for fluid sales. This surplus had to be devoted to uses in which it netted the distributors a lower return. As a result, this low return generally fixed the price to producers for all milk during the spring and summer. Since the distributors were compelled to maintain channels for the receipt of milk over a large enough area to supply their needs in the fall, the low production in the fall months was responsible for a steady enlargement of the Philadelphia milk shed beyond the size needed throughout the rest of the year. This added to the surplus problem each succeeding spring and summer. The distributors were willing to pay a higher price for the milk which was needed for fluid demand in the summer, if by this plan they could be assured of an adequate supply in the fall. The incentive for the necessary increase in fall production could be provided by paying the producer a price based on returns for milk for fluid uses for only that amount which he produced in the fall, and the incentive for a lessened spring production might come from being compelled to accept the price based on manufactured products for the surplus above this amount."

**M. J. B. Ezekial, Special Economic Advisor to Secretary Wallace—Some Economic Aspects of the Marketing of Milk and Cream in New England, U. S. D. A., Circular No. 16, 1927, p. 57.**

"The operation of any production-control plan which aims to bring about an even supply of milk throughout the year is likely to fail unless its adoption is general over the larger part of the actual or potential sources of fluid-milk supply."

"The Basic Rating plan of sale and production control probably requires a higher degree of skillful management than does the Use plan. That is, the latter is

**Base Surplus Plan** inherently more self-adjusting and takes care of its own course more easily. Given a highly capable and aggressive management, the Basic

Rating plan will secure all the market affords and may result in slightly higher prices to producers than does the Use plan. That is because it tends to prevent dealers from obtaining large surplus quantities of milk and resulting decreased prices to producers."

**Agricultural Adjustment, A Report of Administration of the Agricultural Adjustment Act, May, 1933 to February, 1934, AAA, U. S. D. A., G-8, 1934, pp. 160-161.**

"Most of the marketing agreements for the large consuming centers included the so-called 'base-surplus plan' for leveling out production through the year. This system involved an allotment of bases to individual producers designed to insure that each had an opportunity to sell at fluid prices his fair share of the actual fluid sales on the market.

"The base-surplus plan comes into use in a number of fluid-milk markets during and after the World War.

**Base Surplus Plan** It was found that many dairymen produced much more milk in summer than in winter, whereas the demand for fluid milk was nearly uniform throughout the year. Cows usually

freshened in the spring, and because they were put on pasture in summer, the cost of producing milk in the summer was much lower than in winter. It was to bring about a closer coordination of supply to demand

throughout the year, with sufficient milk in the low production season, and to reward the farmer who leveled out his production, that the plan was devised.

"Fluid milk commands a higher price than milk used in other forms. This is because fluid milk must be produced nearby, to meet local health standards, and must be available the year around, including the fall and winter months when production costs are high; whereas butter and other products, which can be stored may be derived from low-cost producing areas and from milk produced in the summer when costs are low.

"Thus the base-surplus plan serves to smooth out the supply over the different seasons of the year, and, as properly administered, is intended to pay the producers approximately in proportion to the use-value of the milk they market. The man who restricts the amount he markets during the summer months approximately to his base is rewarded with a higher average price than that received by the man whose production fluctuates widely between summer and winter. Although effective in reducing seasonal peaks, this system is not in itself regarded as a dependable plan for adjusting production as a whole."

**R. W. Bartlett, Professor of Dairy Economy, University of Illinois—St. Louis Milk Problems With Suggested Solutions, University of Illinois Bulletin 412, pp. 130-131.**

"The restoration of the basic-surplus plan, which tends to discourage wide seasonal variations in production, coupled with strictly enforced quality requirements, which will keep sporadic producers out of the whole-milk market, should, the author believes, reduce greatly seasonal fluctuations in production in this market and thereby permit it to operate on a more efficient basis."

**Base  
Surplus  
Plan**

## APPENDIX C.

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**Herein excerpts found in the Congressional Record of Floor Debates in the House of Representatives and the Senate during the Sixty-Seventh Congress bearing upon the Capper-Volstead Act, 42 Stat. 388, 7 U. S. C. A., Sections 291, 292.**

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**CONGRESSIONAL RECORD, VOLUME 61, PART I.  
*House Debates.***

(page 1046)

The House Bill (H.R. 2373) as reported out of the House Committee on the Judiciary was passed by the House on May 4, 1921.

(page 1039)

"Mr. J. M. Nelson. The purpose of this act is to relieve the farmers from the possible menace of the Sherman Law in interstate commerce, is it not?

"Mr. Sanders of Indiana. I think so.

"Mr. Nelson. And it leaves it to the arbitrary action of the Secretary of Agriculture.

"Mr. Sanders. In the first place.

"Mr. Nelson. Then what do they gain under this law?

"Mr. Sanders. I doubt if they would gain very much.

"Mr. Lawton. They would gain this, would they not? that if this act is passed they will not be liable to prosecution.

"Mr. Sanders. Yes, that is true.

"Mr. Mills (after discussing the case of *Connolly v. Pipe Line*, 184 U. S.). But this bill goes much further than that. The report says that in so far as the terms of the

act are concerned, aside from the mere act of forming an association, they do not apply. The report says that the bill does not eliminate those provisions of the Sherman anti-trust law. I beg to differ with that report. • • • As I say, it permits one of these associations, if necessary, to combine with another association in violation of the Sherman anti-trust act. It permits one association, if necessary, to make an arrangement with all other existing associations not to sell to a single commission merchant that sells below a certain price. It is possible if it is the intent of the framers of this bill to simply permit the formation of an association or corporation for the purpose of marketing, to say specifically in this bill that the other provisions relating to what these associations shall do after they are formed, shall be subject to the provisions of the Sherman anti-trust act.

(page 1040)

"Mr. Tincher. I do not think the farmers of this country ask for class legislation but the way the anti-trust laws, so-called, are being administered today amounts to the proposition that the farmer or the organization of farmers that are attempting to promote their business by organizing, are about the only people who are being bothered by that law. I remember two or three years ago when the agitation for this legislation started, the little dairy interests out in the great state of Ohio attempted to organize and collectively sell their products to a distributor which was a legitimate and fair and right thing to do. It should have been permitted under any law; but they were attacked, and not by the great Department of Agriculture even under the administration of Mr. Blanton's friend, Mr. Houston, but they were attacked by individuals and through the Department of Justice and arrested and placed in jail overnight—a lot of them—for

attempting to sell their product under what is known as collective bargaining.

"Mr. Hill. So, in voting for this bill you vote definitely to repeal the Sherman Act as modified by the act of October 15, 1914, which is known as the Clayton Act. In the second place you definitely authorize the organization of farmers' corporations for price fixing agreements. It has been said here that farmers could not organize to physically work together but they can organize to fix prices and this bill gives that permission. There is no more reason why you should authorize this in the case of farmers and exempt them from the Sherman and other trust acts than you should in case of bathtub makers or tin-can makers. \* \* \* The provision \* \* \* is dangerous and improper in that it authorizes the Secretary of Agriculture to take the place of the Attorney General in instituting the prosecution of cases. \* \* \*

(page 1041)

"Mr. Sumners. (speaking of agricultural associations) They are willing to yield to the public—that the Secretary of Agriculture, in the first instance, who is the agent of the whole public, if prices received are unreasonable, may issue an order against them, to desist, and then if they do not desist the Secretary of Agriculture may go into the Federal court and procure an injunction. In other words, under that arrangement, the Secretary of Agriculture is to stand as a buffer between these farmers' organizations and prosecutions in the Federal courts and is to stand between these organizations and the public and protect the public.

(page 1042)

"Mr. Sumners. Under this bill it is proposed that the Secretary of Agriculture, representing all the people in this country, presumed to be familiar with the problems

of agriculture, will be able to cooperate with these agricultural associations, helping them to build a greater strength for themselves; at the same time when they put the prices up too high instead of jumping on them and putting their members in jail in the first instance, he will say to them—'The prices are too high, you have got to back up.' And if they do not do so, he will then bring suit in the District Court where the farmers will have the same right to defend as they would have in the event of prosecutions brought in the first place. The judgment, if gotten, will be one of injunction and not for crime. This may not work but the farmers want to try it and the Committee has not been able to devise anything better which will have a chance to pass the Senate and it is doubtful if we can get this by.

(In response to a question by Mr. Lankford as to whether or not he favored Section 2 of the Act proposed),

said Mr. Sumners of Texas. "I favor it because it is necessary to get it through and there must be some sort of public control. The farmers themselves recognize that.

• • • It is a choice between giving the Secretary of Agriculture, the Department of Commerce or the Department of Justice original supervision. The farmers prefer the Secretary of Agriculture and I see no reason why the public should object to his designation.

(page 1043)

"Mr. Hersey. Mr. Speaker, this bill exempts farmers co-operative marketing associations from the provisions of the Sherman Anti-trust law and the Clayton Anti-trust act . . . .

(page 1044)

• "Mr. Volstead. • • • Section 2 has the entire approval of the farm organizations. • • • It is perfectly evident to any lawyer that it is an advantage to

the farmers to have Section 2 in the bill, not only for the reason expressed by the gentleman from Texas a minute ago but because in the event that there is a complaint against them they will not be subject to criminal prosecution if their organization is permitted by this bill, but an investigation will be had before the Secretary of Agriculture, who is given power to deal with the matter."

CONGRESSIONAL RECORD; VOLUME 62, PART II.

*Senate Debates.*

The House Bill, (H.R. 2373) as it passed the House of Representatives was called up for consideration before the Senate on January 31, 1922 by Senator Kellogg of Minnesota, Congressional Record, Volume 62, Part 2, p. 1978. Thereafter, at p. 2048 of the same volume, after motion that this bill be considered by the Senate as a Committee of the whole, the same Senator, in speaking in favor of the bill stated:

"As time has passed, it has become necessary for the States and the Congress to adopt modifications in some degree of the antitrust act to permit reasonable aggregations of capital and reasonable cooperation among producers, manufacturers, and traders; and we have, as I shall show, adopted several measures looking toward that end. I believe that one of the most important measures now before the Congress and the country is the one to encourage and reasonably to protect cooperative marketing associations."

Further, at page 2049, after a general discussion of the provisions of the bill, he stated:

"It may be said, therefore, that before such associations can be prosecuted under the Sherman Act for any restraint of trade or monopoly, whether it is a mere technical monopoly or not, the Secretary of Agriculture

must investigate and make a finding that the cooperative association is in restraint of trade or is a monopoly and is unduly enhancing prices."

After discussion of the protection to the public afforded by the bill he was asked by Mr. King:

"It is intended, then, as I understand the Senator, to make all such organizations absolutely immune from criminal prosecution.

"Mr. Kellogg. They are immune from criminal prosecution, and I think they ought to be. I have never known much to be accomplished by criminal prosecution under the Sherman Act; if anything, very little.

"Mr. King. It denies the right of the Attorney General to initiate proceedings, even though he should believe from uncontrovertible evidence that a monopoly stupendous in character and oppressive in results exists by reason of combinations of the character contemplated.

"Mr. Kellogg. The Senator understands from the statement I made that the Attorney General can prosecute suits instituted by the Secretary of Agriculture."

Further, at page 2053, after a further discussion of the various provisions of the bill, Mr. Kellogg, in discussing the proposed Senate amendment striking out Section 2 of the House Bill and adding to Section 1 the following provision:

"Nothing herein contained shall be deemed to authorize the creation of or attempt to trade a monopoly or to exempt any association organized thereunder from any proceedings instituted under the act, entitled, 'An Act to Create a Federal trade commission,' to define its powers and duties and for other purposes, approved September 26, 1914, on account of unfair methods of competition in commerce, said:

"But Mr. President, because there are a few products

of which the committee feel there is danger of monopolization, they propose to hold the sword and the threat of the Sherman Act over all the farming activities of the country, and subject them to unreasonable prosecution and harassments in order to protect the public in a few articles. This bill furnishes ample protection against undue exactions in those articles which it is claimed may be monopolized."

Subsequently, at p. 2058, of the same volume, after further general discussion of the provisions of the bill and the Senate amendment, Senator Capper stated:

"The bill, as it passed the House, and which I hope will have the approval of the Senate, gives to consumers a protection which they do not now have as against middlemen, in that if such farmers' marketing associations unduly enhance prices a complete and adequate remedy is provided in section 2. If such associations unduly enhance prices, the Secretary of Agriculture may order them to cease and desist from monopolizing and restraining trade and commerce."

After further general discussion of the provisions of the bill and the problem which faced agriculture, Senator Fletcher, speaking in favor of the bill at p. 2107 of the same volume stated the following:

"I am cordially in full sympathy with the ideas and the plans which are back of this bill. I do not agree that it is necessary to amend the bill as proposed by the committee in order to avoid the establishment of a monopoly and I think it is advisable to place these associations or organizations outside the provisions of the Sherman anti-trust law."

After extended discussion of the different types of farm legislation in reference to the national farm loan associations and allied credit boards, Senator Walsh of Montana, at p. 2120, speaking in favor of the amendment proposed by

the Senate committee on the Judiciary, caused to be introduced into the record the report of that committee recommending the amendment set forth above. Thereafter, at p. 2122, that Senator spoke as follows:

"I shall be glad to answer the Senator, and that is the course my argument would naturally take.

"Mr. President, this legislation is asked because, it is said, the organization of such associations as those authorized by the bill is fraught with peril of prosecution under the Sherman Act as in violation of its provisions. Bear in mind that no prosecution, so far as the committee was able to ascertain, has ever been instituted under the Sherman Act against any organization of farmers except the proceedings brought against what is known as the California Raisin Growers' Association, of which I shall speak later. I have indicated to the Senate that at the present time vast cooperative associations are actually in operation, the Equity, for instance. Recently there has been organized a great cooperative association known as the National Grain Dealers' Association. The California Fruit Growers' Association has been operating for something like 15 years.

"At no time has any prosecution been instituted against any of these organizations upon the ground that they are violative of the Sherman Act, I take it, because it is the view of those charged with the operation of the law that such combinations as are in existence are not in unreasonable restraint of trade, and that therefore they do not fall under the condemnation of the statute. That seems to have been the judgment of everybody up to this time.

"But it is said that when advocates of the organization of these cooperative farm associations go about for the purpose of inducing farmers thus to cooperate and to associate themselves in cooperation for the purpose of marketing their products, interested parties, those who handle

the business now, the oldline elevator companies in our section of the country, the old commission men dealing in raisins in California, and generally through the country the dealers in milk products, noise it about and circulate a rumor to the effect that organizations of that character are violative of the Sherman Act, and prosecutions are likely to be instituted if they are organized. Thus it is said, though I do not know how effectively, that farmers are deterred from associating themselves with these associations by reason of fear of prosecution under the Sherman Act.

"It is my purpose and I think the purpose of most of the members of the committee, at least a majority of the members of the committee, to relieve these people from the peril, if there be peril, of prosecution under the Sherman Act, so far as section 1 is concerned."

"Now, I will answer the question of the Senator from Oregon. The Sherman Act in its important provisions deals with two problems. It penalizes two different things. Section 1 of the Sherman Act forbids any combination, contract, or conspiracy in restraint of trade. Section 2 forbids monopolies and penalizes monopolies wherever they may exist. I read section 1:"

(Section 1 of the Sherman Act read.)

"That is, every contract, combination in the form of a trust or otherwise, or conspiracy in restraint of trade is punishable by section 1. Section 2 reads as follows:"

(Section 2 of the Sherman Act read.)

"The answer to the Senator from Oregon is that it is our purpose [by the amendment] to relieve these associations from all possible risk of being prosecuted under section 1 of the act, but not under section 2."

## CONGRESSIONAL RECORD, VOLUME 62, PART III.

After considerable general discussion of the provisions of the bill and the reasons for the Sherman Act, the following question was proposed by Mr. Pomerene:

(page 2160)

"How does the Senator from Montana differentiate between section 2 and section 1 of the Sherman Act. In other words, he wants to preserve the provisions of section 2 with respect to the monopolization of any part of the trade or commerce among the States. The first section, as the Senator knows, declares 'every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade' to be illegal. Is it the Senator's desire to preserve intact the provisions of section 1 of the Sherman law?

"Mr. Walsh of Montana. No; it is my desire to get rid of it so far as farm marketing corporations are concerned. That is the answer I made to the Senator from Oregon (Mr. McNary), who asked me what the Senate Committee bill gives to the farmers that they have not now. It gives them immunity from section 1 of the Sherman Act and does not give them immunity from section 2 of that act.

"Mr. Walsh of Montana. The Senator puts the question a little too broad for me. I can state my position without the slightest hesitancy or difficulty at all.

"I do not believe that when Congress passed the Sherman antitrust law it had in contemplation at all associations of farmers or farmers assembling themselves together for the purpose of putting their products on the market. I do not recall, and I am sure history affords no evidence of, any grievous wrong ever done to the people of the country by associations or combinations of that kind. I believe that associations of that character stand upon an entirely different footing and that the legislation may be easily classi-

fied so that those associations should be dealt with upon one basis and according to one system of laws, and the ordinary business combination of non-producers, simply dealers in the products, upon an entirely different plane.

After discussion of section 2 of the Capper-Volstead Act, a further colloquy between Mr. Pomerene and Mr. Walsh occurred:

(page 2161)

"Mr. Pomerene. Mr. President, I am very much interested in the Senator's discussion. A moment ago the Senator said that he sought to relieve agricultural cooperative associations from the provisions of section 1 of the Sherman antitrust law, which declares:

Every contract, combination in the form of trust or otherwise; or conspiracy in restraint of commerce among the States or with foreign nations is hereby declared to be illegal.

The Senator also is very careful in the substitute bill to preserve intact, as I understand his explanation, the anti-monopoly provisions of section 2 of that act. Having done that as to the provisions of section 1 in reference to restraint of trade, suppose that the association does, in fact, enter into a conspiracy or combination in the form of a trust which does unduly enhance the price of milk—let us say, by way of illustration, that it makes the price of milk 25 cents a quart to the consumer—what remedy would exist if such a condition should prevail?

"Mr. Walsh of Montana. Of course, the Senator from Ohio would have first to give me the facts. It could not possibly be a monopoly, because there is an express provision in the proposed act that it does not authorize the creation of a monopoly. If the absence of monopoly is admitted, then there is competition just exactly as there is now; the matter is regulated by competition. To illustrate

the point, let me take the case of the Raisin Growers' Association, to which I have heretofore referred. That cooperative association undoubtedly has been a great thing for the growers of raisins in the State of California; and I do not undertake to say that it has not been a good thing for the growers of raisins throughout the United States.

"I simply say that a power is placed in the hands of that association which ought to be reposed in no set of men, for at any time they may take advantage of the opportunity they have and exact exorbitant prices.

"Mr. Pomerene. When the Senator says he does not want a monopoly in the production of milk he is speaking generally, but I am going to take it for granted that he means monopoly as defined in section 2 of the Sherman Act which prohibits the monopolization of 'any part' of the trade or commerce. I think we understand that; but when it comes to section 1 the Senator says, 'I want to relieve these organizations of any of the restrictions contained in that section,' which declared illegal 'every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade.'

"Assume that there has been organized in the city of Washington an association among the milk producers of Maryland, Virginia, and the District of Columbia, under that organization the Senator desires to permit them to restrain trade. Of course, he means to a reasonable extent; but, if they are permitted to restrain trade, why are they not creating a monopoly of a part of the trade? That is the difficulty which presents itself to my mind.

(page 2162) -

"Mr. Walsh of Montana. If the Senator from Wisconsin will pardon me for just a moment, I will yield to him in a few moments. If the Senator from Ohio will endeavor

to place the proposition in some concrete form before me I am sure that I can give a very much more satisfactory answer to his question. My idea is to leave the provisions of section 2 of the Sherman Act intact, to make them applicable to associations organized under this bill as well as to all other associations and all other individuals.

“Mr. Lenroot. But if there be, as a matter of fact, an undue restraint of trade, short of a monopoly, will the Senate substitute prohibit it?

“Mr. Walsh of Montana. The Senate substitute will not prohibit it, and neither will the House bill, as I shall show presently. My contention about the matter is, though, that there will be no undue enhancement if we eliminate the monopoly feature, because competition will take care of it then, just as it does now.

“Mr. Lenroot. • • • I understand the Senator’s position, then, to be that if there be a partial restraint of trade, short of monopoly, and undue enhancement of prices results; such restraint is held to be legal, and there is no remedy, while the House bill permits not only partial restraint of trade but complete monopoly, but if there be undue enhancement of price in either case it is regulated, first, by the Secretary of Agriculture, and secondly, by the courts. Am I correct?

“Mr. Walsh of Montana. In a certain way the Senator is correct; but I propose to discuss the whole subject of section 2 and give you my views to the effect that the House provision is entirely unnecessary, in the first place, and is entirely nugatory, in the second place.

(page 2164)

“Mr. Walsh of Montana. • • • I trust the Senator from Florida, whose mind is always clear upon these matters,

will address it to the case that I have supposed. The secretary finds that all of these people are in the association, that it constitutes a monopoly, and that it charges 16 cents a quart for milk, which is an unreasonable price. What kind of an order under those circumstances does the Secretary make? There is no use talking about proceedings in court and about the Attorney General, and that kind of thing, because the court does not come into action until after the Secretary makes his order. We want to know what the Secretary can do. The court can revise or modify that order.

"Mr. Norris. In answer to the Senator's proposition as to what kind of order the Secretary could make, I wish to make this suggestion: In the case the Senator has used as an illustration the Secretary finds that the association is a monopoly and that it has unduly enhanced the price of milk. Would it not be perfectly proper and reasonable and legal for the Secretary to say that he finds, first, that it is a monopoly, which it is necessary to find, and then that it has unduly enhanced the price of milk from 10 cents, which is a reasonable price, to 16 cents, which is an unreasonable price? Would it not have the effect at least of putting the association on notice that it never would get by the Secretary until it reduced it down to the price he had fixed?

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"Mr. Norris. The Senator suggests that they would desist from 16 cents and come back with a price of 15½ cents, but if the Secretary had already told them in his first order what he regarded as a reasonable price, even assuming that he has no more power than the Senator says he has, it seems to me the association would only take upon themselves a lot of unnecessary litigation and trouble, because they would know they would eventually be refused and the

price set aside until they got down to the price the Secretary had fixed.

"Mr. Pomerene. I would like to ask the Senator another question. The Senator has been discussing the price regulation features of the House bill. Of course, I think we must all concede that it is possible to charge the consumer excessive prices under either the House bill or the bill as reported from the Senate committee. Assume, for the sake of the argument, that these associations are organized and that excessive prices are charged to the consumer, what remedy is there?

"Mr. Cummins. I have been prompted for some minutes to ask the Senator from Montana with regard to the duty imposed upon the Secretary to ascertain, and then determine officially whether or not the price of any agricultural product has been unduly advanced, I assume, by reason of the monopoly or by reason of the restraint of trade. What rule known to the law or prescribed in the statutes would be applied by the Secretary of Agriculture in determining whether or not the price has been unduly advanced?

(page 2166)

"Mr. Walsh of Montana. No; not if it does not amount to a monopoly. In other words, if the Senator will pardon me, I want to leave that just exactly as it is now. A suit can not be brought now unless it is brought under the Sherman Act.

"Mr. Kellogg. I do not agree with the Senator; but under the Senator's substitute a suit would have to be brought under the Sherman Act if there was a monopoly. Is not that true?

"Mr. Walsh of Montana. Yes; that is true.

"Mr. Kellogg. Very well. Under the House bill, if a

suit is brought by the Secretary of Agriculture he can invoke every remedy that the Sherman Act provides for; can he not?

"Mr. Walsh of Montana. I do not think so.

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"Mr. Walsh of Montana. I will say to the Senator with perfect frankness that it was my idea that this bill, being later than the Sherman Act, and authorizing these associations, and authorizing them to make the contracts necessary, operated of necessity, *pro tanto*, as a repeal of the Sherman Act. That was my theory about it, but I must confess that I have such deference to the opinion of Mr. Thorne with respect to matters of this kind that I am somewhat disturbed in my view about it.

"Mr. Cummins. \* \* \* The Senator from Minnesota suggested, as I recall his observation, that after the Secretary of Agriculture acted under section 3, the Sherman law would be in full force as to that corporation or association. I do not quite understand that. If I correctly interpret the decisions, as well as the law itself, restraint of trade is unlawful, no matter whether it increases or decreases prices. Monopoly is unlawful, no matter whether its effect may be to increase or to decrease prices. Does the Senator from Minnesota mean to say that the Sherman law, then, could be applied in its full force to a corporation condemned by the Secretary of Agriculture?

"Mr. Kellogg. No; I did not say so. I said that if the Secretary of Agriculture found that the restraint of trade and the monopoly had gone to such an extent that the price of agricultural products was unduly enhanced, he could make an order against the restraint of trade and the monopoly, and if he brought a suit to enforce that, the court could apply any remedy against that particular monopoly.

and restraint of trade that it could now apply under the Sherman Act—that is, in the same form. To make that perfectly clear, the Senator from Kansas (Mr. Capper) offered an amendment, on page 3, line 13, of the bill, to insert, after the word 'order', the following:

Or enter such other decree as the court may deem equitable."

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"Mr. Walsh of Montana. • • • In an article which he (the present Chief Justice of the Supreme Court) contributed to one of the law magazines some time ago he called attention to the fact that the case of Connolly against Union Sewer Pipe Co. arose under a State statute, and that the decision was put upon the ground that the statute had violated the 'equal protection of the laws' clause of the fourteenth amendment to the Constitution. However, he said in that connection that if Congress should pass such an act as that enacted by the Legislature of Illinois doubtless other provisions of the Constitution would be found under which it would likewise be condemned. So the present Chief Justice, at least, is rather committed in that way.

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"Mr. Brandegee. • • • We are asked to pass a statute which, except for the prohibition of an actual monopoly, would allow all the people included in the classes to which I have referred to make any sort of contracts they want to make, without any authority on the part of the Government to question them.

"What purposes? The necessary contracts and agreements for 'collectively handling and marketing in interstate and foreign commerce such products of the persons so engaged,' and so forth. They may make such con-

tracts as are necessary to produce, process, get into the market, and effectively sell such products, but the Sherman law says that 'every contract, combination in the form of trust or otherwise, or conspiracy in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal.' That is where this bill takes these associations out of the Sherman antitrust act.

"Mr. Pomerene. Does the Senator construe the provision of the bill to which he has just referred, namely, that they can make such contracts as they see fit, to be broad enough to authorize them to make any contracts they see fit, for instance, with Swift & Co. or with any large milling company, with regard to the marketing of their products?

"Mr. Brandegee. They can make contracts with anybody or with any corporation.

"Mr. Pomerene. And fixing the prices at anything they see fit?

"Mr. Brandegee. Yes; under that they can make contracts with each other that they would not offer for sale a pound of cotton or a piece of tobacco or a bushel of wheat or a beef steer in the country; an agreement with each other that they would raise them and hold them all back until they got word, from the central office as to the price at which the members should be allowed to sell. If anybody else does it, it is a crime, and he would be put in State prison for it.

"As I said, it puts in the control of these interlocking associations of men, who raise and handle everything that comes from the soil, every article of food and every constituent that goes into the making of clothing. It gives them, if they have a mind to exercise it, a stranglehold upon the whole United States to hold up prices, to agree

to withhold their crops from the market until a stipulated price is reached, and to make every sort of contract that has been hitherto considered against the public interest and made a crime, which was made a crime in 1890, and has been so considered for 32 years, by common consent.

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"Mr. Townsend. . . . The House bill proposes that farmers may organize—I think they can do it under the law now—for the purpose of controlling markets in the sense of taking advantage of the best market possible, consistent with the good of the country. Threats of prosecutions, however, hinder them from organizing. The House bill proposes to permit proper organization. The proponents of the amendment say that they have no objection to eliminating the possibility of section 1 of the Sherman antitrust law applying to agricultural organizations, but they lay especial emphasis on their claim that section 2 must apply to these organizations. Why, sir, if this amendment is agreed to, then I submit that the Congress has specifically stated that even though the original intention of the makers of the Sherman antitrust law was not to cover farmers' organizations, it shall cover those organizations henceforth from the passage of this bill. It would be better to defeat the measure than pass it with this amendment.

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"Mr. King. As I read the House bill before us, the question of monopoly is not a matter of consideration at all by the Secretary of Agriculture. There may be a monopoly, but he may not invoke his power or use his power for the purpose of suppressing it or issuing any order with respect to the monopoly. He can only act if he conceives that there is an undue enhancement of price. Of

course, I presume the Senator will reply there can not be an undue enhancement of price unless there is a monopoly. There may be something in the argument, but I call the Senator's attention to the fact that the Secretary of Agriculture may not act at all because there is a monopoly.

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"Mr. Lenroot. Does the Senator from Montana disagree with that? This is an affirmative piece of legislation.

"Mr. Walsh of Montana. I have never heard such a proposition as that asserted before. If the Sherman Act was a valid constitutional enactment at the time it was enacted, it could not become unconstitutional by reason of an amendment to it.

"Mr. Lenroot. Certainly Congress has power—I do not think the Senator will disagree with me upon that—to provide a different method of dealing with combinations than has heretofore been provided by Congress, even if it does not in subsequent legislation cover all combinations but does cover some.

"Mr. Walsh of Montana. I have no doubt that Congress may expressly or impliedly repeal the Sherman law.

"Mr. Lenroot. Certainly.

"Mr. Walsh. But I can not follow the Senator from Wisconsin when he says that by a subsequent act of Congress the Sherman law may be held to be unconstitutional.

"Mr. Lenroot. Let me answer the Senator. Supposing Congress enacts subsequent legislation, which it has the power to enact, for, without question, if there had never been a Sherman law passed, the legislation it enacted would be perfectly proper; but, by reason of the existence of the Sherman law, we have attempted to deal in one

way with a certain class of people and in a different way with another class of people; and it should be held that, while in dealing with one class of people we must deal with all alike, or, although there is an evil which the Sherman law was intended to cover and to remedy, we may remove a part of that class from the Sherman law just the same as if we had made an exception to the Sherman law in this instance, which was exactly what was held in the Connolly case.

"Mr. Lenroot. If the Senator will permit me, it was urged in the Connolly case that although the exception of growers of agricultural products was unconstitutional, nevertheless the remainder of the act could stand; but the court said, 'No; the legislature of the State of Illinois has decreed that growers of agricultural products should not be subject to the law; therefore we can not read them into it; and inasmuch as the first section provides that all persons shall be subject to the law, and yet the legislature specifically said that the growers of agricultural products shall not be, therefore the whole law is invalid.'

"Mr. Walsh of Montana. I do not desire to follow the argument of the Senator or to attempt to refute it. I merely state my own position with respect to the matter. If the legislature of the State of Illinois had passed its antitrust act without the offensive clause in it and had enacted the offensive clause at a subsequent session, the original law, in my judgment, would stand unimpaired and the qualifying clause would be held unconstitutional. It would be held unconstitutional upon the ground that it was equivalent to the reenactment of the original act with the qualifying clause. That would be the law which would be declared to be unconstitutional and not the other law, which would remain unimpaired. So here the

Sherman Act exists; it is the law. If we pass this bill we pass a law which practically says, 'The Sherman Act is hereby reenacted subject to the following conditions, however.' Then the question would be presented as to the legality and constitutionality not of the original act but of the subsequent act, and that being held unconstitutional, the original act would remain in all of its force and effect.

(page 2279).

"Mr. Walsh of Montana. \* \* \* I wish it to be thoroughly understood, as we proceed to vote, that to reject the Senate substitute and to adopt the House text will be to remove the inhibition from setting up any milk monopoly in any one of the great cities of the country, and with no check upon anything they may do in the way of exacting exorbitant prices from consumers, except as it is provided in section 3 of the bill, the validity of which is open to most serious question, as pointed out in the very persuasive and informing discussion by the Senator from Iowa (Mr. Cummins), which no one has attempted to answer at all, and as to the significance and operation of which even the proponents of the bill differ.

(page 2282)

House Bill (H.R. 2373) was passed by the Senate February 8, 1922, with minor amendments, restricting the language of the Bill to interstate commerce and providing for rules and regulations by the Secretary of Agriculture for the taking of evidence and expanding decrees of the District Court to include any arrangement the Court might deem equitable. On February 11, 1922 the House concurred in the Senate amendments, pages 2453 to 2455.

# SUPREME COURT OF THE UNITED STATES.

No. 397.—OCTOBER TERM, 1939.

The United States of America, Appellant, vs. The Borden Company, Charles L. Dres- sel, Harry M. Reser, et al.	Appeal from the District Court of the United States for the Northern District of Illinois.
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[December 4, 1939.]

Mr. Chief Justice HUGHES delivered the opinion of the Court.

The Government appeals from a judgment of the District Court sustaining demurrers and dismissing an indictment charging combination and conspiracy in violation of Section one of the Sherman Anti-Trust Act. 28 F. Supp. 177.

The trade and commerce alleged to be involved is the transportation to the Chicago market of fluid milk produced on dairy farms in Illinois, Indiana, Michigan and Wisconsin and the distribution of the milk in that market. The Government divides the defendants into five groups,—(1) distributors and allied groups which include a number of corporations described as major distributors and their officers and agents, the Associated Milk Dealers, Inc., a trade association of milk distributors, and its officers and agents, and the Milk Dealers Bottle Exchange, a corporation controlled by the major distributors; (2) the Pure Milk Association, a cooperative association of milk producers incorporated in Illinois, and its officers and agents; (3) the Milk Wagon Drivers Union, Local 753, engaged in the distribution of milk in Chicago, and certain labor officials; (4) municipal officials, including the president of the Board of Health of Chicago and certain subordinate officials; (5) two persons who arbitrated a dispute between the major distributors and the Pure Milk Association, fixing the price of milk to be paid to the members of the association.

The indictment, which was filed in November, 1938, contains four counts. The several defendants challenged it by demurrers and motions to quash on various grounds. The District Court held with respect to counts one, two and four, that the production and mar-

*United States vs. Borden Company et al.*

keting of agricultural products, including milk, are removed from the purview of the Sherman Act by the Agricultural Marketing Agreement Act of 1937 (50 Stat. 246); also with respect to all four counts, according to the formal terms of its judgment, that the Pure Milk Association, as an agricultural cooperative association, its officers and agents, are exempt from prosecution under Section one of the Sherman Act by Section 6 of the Clayton Act (15 U. S. C. 17), Sections one and two of the Capper-Volstead Act (7. U. S. C. 291, 292), and the Agricultural Marketing Agreement Act. With respect to count three, the District Court held that it was duplicitous, in the view that it charged several separate conspiracies and also that it did not definitely charge a restraint of interstate commerce.

The judgment expressly overruled the demurrers and motions to quash so far as they challenged the constitutionality of the Sherman Act or the sufficiency of the allegations of unlawful conspiracy, and also so far as it was contended that interstate commerce was not involved in counts one, two, and four. The court added that it overruled all the defendants' contentions which it had not specifically overruled or sustained. The judgment ends by dismissing the indictment as to all defendants.

The first question presented concerns our jurisdiction. The exceptional right of appeal given to the Government by the Criminal Appeals Act is strictly limited to the instances specified.<sup>1</sup> The provision invoked here is the one which permits review where a decision quashing or sustaining a demurrer to an indictment or any of its counts is based upon the "construction of the statute upon which the indictment is founded". The decision below was not predicated upon invalidity of the statute.

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1 This Act (18 Stat. 682; Jud. Code, Sec. 238, 28 U. S. C. 345) provides:

"An appeal may be taken by and on behalf of the United States from the district courts direct to the Supreme Court of the United States in criminal cases, in the following instances, to wit:

"From a decision or judgment quashing, setting aside, or sustaining a demurrer to, any indictment, or any count thereof, where such decision or judgment is based upon the invalidity, or construction of the statute upon which the Indictment is founded.

"From a decision arresting a judgment of conviction for insufficiency of the indictment, where such decision is based upon the invalidity or construction of the statute upon which the indictment is founded.

"From the decision or judgment sustaining a special plea in bar, when the defendant has not been put in jeopardy.

"Pending the prosecution and determination of the appeal in the foregoing instances, the defendant shall be admitted to bail on his own recognizance: Provided, That no appeal shall be taken by or allowed the United States in any case where there has been a verdict in favor of the defendant".

The established principles governing our review are these: - (1) Appeal does not lie from a judgment which rests on the mere deficiencies of the indictment as a pleading, as distinguished from a construction of the statute which underlies the indictment. - (2) Nor will an appeal lie in a case where the District Court has considered the construction of the statute but has also rested its decision upon the independent ground of a defect in pleading which is not subject to our examination. In that case we cannot disturb the judgment and the question of construction becomes abstract. (3) This Court must accept the construction given to the indictment by the District Court as that is a matter we are not authorized to review. (4) When the District Court holds that the indictment, not merely because of some deficiency in pleading but with respect to the substance of the charge, does not allege a violation of the statute upon which the indictment is founded, that is necessarily a construction of that statute. (5) When the District Court has rested its decision upon the construction of the underlying statute this Court is not at liberty to go beyond the question of the correctness of that construction and consider other objections to the indictment. The Government's appeal does not open the whole case.

*First.*: The first two of these principles, as the Government concedes, preclude our review of the decision below as to count three. For that count was held bad upon the independent ground that it is defective as a pleading, being duplicitous and also lacking in definiteness. *United States v. Keitel*, 211 U. S. 397-399; *United States v. Carter*, 231 U. S. 492, 493; *United States v. Hastings*, 296 U. S. 188, 192-194. The appeal as to count three must be dismissed.

*Second.*: After a general description of the averments of the indictment, which was explicitly founded on Section one of the Sherman Act, the District Court construed counts one, two and four as follows:

"Count 1 charges a conspiracy 'to arbitrarily fix, maintain and control artificial and non-competitive prices to be paid to all producers by all distributors for all fluid milk produced on approved dairy farms located in the states of Illinois, Indiana, Michigan and Wisconsin, and shipped to Chicago'.

"Count 2 charges a conspiracy 'to fix and maintain by common and concerted action, uniform, arbitrary and non-competitive prices for the sale by the distributors in the city of Chicago of fluid milk shipped into the said city from the states of Illinois, Indiana, Michigan and Wisconsin'".

"Count 4 charges a conspiracy 'to restrict, limit and control and to restrain and obstruct the supply of fluid milk moving in the channels of interstate commerce into the city of Chicago from the states of Illinois, Indiana, Michigan and Wisconsin'."

The District Court further summarized the allegations in these counts as to the methods by which the alleged conspiracies were intended to be effected. 28 F. Supp. pp. 179-181. This construction of the indictment is binding upon this Court on this appeal. *United States v. Patten*, 226 U. S. 525, 535, 540; *United States v. Colgate*, 250 U. S. 300, 301; *United States v. Schrader's Son*, 252 U. S. 85, 98; *United States v. Yuginovich*, 256 U. S. 450, 461; *United States v. Hastings, supra*, p. 192.

*Third.* The District Court, thus construing counts one, two and four, held as a matter of substance that, because of the effect of the later statutes, these counts did not charge an offense under Section one of the Sherman Act. This was necessarily a construction of the Sherman Act. *United States v. Patten, supra*; *United States v. Birdsall*, 233 U. S. 223, 230; *United States v. Karp*, 302 U. S. 214, 217. We are not impressed with the argument that the court simply construed the later statutes. The effect of those statutes was considered in determining whether the Sherman Act has been so modified and limited that it no longer applies to such combinations and conspiracies as are charged in counts one, two and four. Thus the Sherman Act was not the less construed because it was construed in the light of the subsequent legislation.

We have jurisdiction under the Criminal Appeals Act to determine whether the construction thus placed upon the Sherman Act is correct.

*Fourth.* In reaching its conclusion, the District Court referred to Section 6 of the Clayton Act, Sections 1 and 2 of the Capper-Volstead Act, and the Agricultural Adjustment Act of 1933, as amended in 1935, and as reenacted and amended by the Agricultural Marketing Agreement Act of 1937.

With respect to the Clayton Act,<sup>2</sup> the court said in its opinion: "By that act labor, agricultural or horticultural cooperative organizations were excepted from the broad and sweeping terms of the

<sup>2</sup> Section 6 of the Clayton Act (38 Stat. 730, 15 U. S. C. 17) provides:

"The labor of a human being is not a commodity or article of commerce. Nothing contained in the antitrust laws shall be construed to forbid the existence and operation of labor, agricultural, or horticultural organizations, instituted for the purposes of mutual help, and not having capital stock or con-

Sherman Act. Such cooperative organizations, in and of themselves, were not to be construed as illegal combinations or conspiracies in restraint of trade under the anti-trust laws". 28 F. Supp. 183. But the court did not hold that, by these provisions of the Clayton Act, either the defendants Pure Milk Association and its officers and agents or the defendants Milk Wagon Drivers Union, Local 753, and its officials, (albeit these organizations were not in themselves illegal combinations or conspiracies) were rendered immune from prosecution under the Sherman Act for their alleged participation in the combinations and conspiracies charged in counts one, two and four of the indictment. The Sherman Act was not construed by the District Court as having been limited to that extent by the Clayton Act.

The court invoked the Capper-Volstead Act,<sup>3</sup> as its judgment shows, only in relation to certain defendants, that is, the Pure Milk Association, an agricultural cooperative organization, and its officers and agents. We shall consider later the effect of that statute upon the charge against those defendants.

The court dismissed the indictment as to all defendants, and we think it manifest that this ruling in its bearing upon counts one, two and four was due to the effect upon the Sherman Act which the court attributed to the Agricultural Marketing Agreement Act.<sup>4</sup>

(1). As to that Act, the court said:

"The Court holds that, by the Agricultural Marketing Agreement Act the Congress has committed to the Executive Department, acting through the Secretary of Agriculture, full, complete, and plenary power over the production and marketing, in interstate commerce, of agricultural products, including milk."

"To what extent he should act, the quantum of regulation is solely one for his judgment and decision. If conditions require, he must act; if they do not require action, then all marketing conditions are deemed satisfactory and the purpose of the act is effectuated. Non-action by the Secretary of Agriculture, in any given marketing area, is equivalent to a declaration that the policy

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ducted for profit, or to forbid or restrain individual members of such organizations, from lawfully carrying out the legitimate objects thereof; nor shall such organizations, or the members thereof, be held or construed to be illegal combinations or conspiracies in restraint of trade, under the antitrust laws".

<sup>3</sup> 42 Stat. 388, 7 U. S. C. 291, 292.

<sup>4</sup> The District Court referred in passing, to the Cooperative Marketing Act of July 2, 1926 (44 Stat. 803, 7 U. S. C. 455), and to the provisions of the Agricultural Adjustment Act of 1933 (48 Stat. 31), as amended in 1935 (49 Stat. 750), which was followed by the Agricultural Marketing Agreement Act of 1937 (50 Stat. 246).

of the act, in that area, is being carried out. If the policy of the act, in any given milk area, is being violated it becomes the duty of the Secretary of Agriculture to intervene and invoke the powers conferred upon him by the act.

"It results, from what has been said, that the power of regulation, supervision and control of the milk industry, in any given milk shed, is, by the Agricultural Marketing Agreement Act of 1937, vested exclusively in the Secretary of Agriculture. It follows further that the Secretary of Agriculture cannot by his own action, or inaction, divest himself of this power so long as the statute remains in force. The marketing of the agricultural products, including milk, covered by the Agricultural Marketing Agreement Act, is removed from the purview of the Sherman Act. In other words, so far as the marketing of agricultural commodities, including milk, is concerned, no indictment will lie under section 1 of the Sherman Act". 28 F. Supp. p. 187.

It will be observed that the District Court attributes this effect to the Agricultural Marketing Agreement Act *per se*, that is, to its operation in the absence, and without regard to the scope and particular effect, of any marketing agreements made by the Secretary of Agriculture or of any orders issued by him pursuant to the Act. In the opinion of the court below, the existence of the authority vested in the Secretary of Agriculture, although unexercised, wholly destroys the operation of Section 1 of the Sherman Act with respect to the marketing of agricultural commodities.

We are of the opinion that this conclusion is erroneous. No provision of that purport appears in the Agricultural Act. While effect is expressly given, as we shall see, to agreements and orders which may validly be made by the Secretary of Agriculture, there is no suggestion that in their absence, and apart from such qualified authorization and such requirements as they contain, the commerce in agricultural commodities is stripped of the safeguards set up by the Anti-Trust Act and is left open to the restraints, however unreasonable, which conspiring producers, distributors and their allies may see fit to impose. We are unable to find that such a grant of immunity by virtue of the inaction, or limited action, of the Secretary has any place in the statutory plan. We cannot believe that Congress intended to create "so great a breach in historic remedies and sanctions".<sup>8</sup>

It is a cardinal principle of construction that repeals by implication are not favored. When there are two acts upon the same sub-

<sup>8</sup> See *General Motors Corporation v. United States*, 286 U.S. 49, 61.

ject, the rule is to give effect to both if possible. *United States v. Tynen*, 11 Wall. 88, 92; *Henderson's Tobacco*, 11 Wall. 652, 657; *General Motors Corporation v. United States*, 286 U. S. 49, 61, 62. The intention of the legislature to repeal "must be clear and manifest". *Red Rock v. Henry*, 106 U. S. 596, 601, 602. It is not sufficient, as was said by Mr. Justice Story in *Wood v. United States*, 16 Pet. 342, 362, 363, "to establish that subsequent laws cover some or even all of the cases provided for by [the prior act]; for they may be merely affirmative, or cumulative, or auxiliary". There must be "a positive repugnancy between the provisions of the new law, and those of the old; and even then the old law is repealed by implication only *pro tanto* to the extent of the repugnancy". See, also, *Posados v. National City Bank*, 296 U. S. 497, 504.

The Sherman Act is a broad enactment prohibiting unreasonable restraints upon interstate commerce, and monopolization or attempts to monopolize, with penal sanctions. The Agricultural Act is a limited statute with specific reference to particular transactions which may be regulated by official action in a prescribed manner. The Agricultural Act<sup>6</sup> declares it to be the policy of Congress "through the exercise of the powers conferred upon the Secretary of Agriculture under this chapter, to establish and maintain such orderly marketing conditions for agricultural commodities in interstate commerce as will establish prices to farmers at a level that will give agricultural commodities purchasing power with respect to articles that farmers buy, equivalent to the purchasing power of agricultural communities in the base period" described. To carry out that policy a particular plan is set forth. Farmers and others are not permitted to resort to their own devices and to make any agreements or arrangements they desire, regardless of the restraints which may be inflicted upon commerce. The statutory program to be followed under the Agricultural Act requires the participation of the Secretary of Agriculture who is to hold hearings and make findings. The obvious intention is to provide for what may be found to be reasonable arrangements in particular instances and in the light of the circumstances disclosed. The methods which the Agricultural Act permits to attain that result are twofold, marketing agreements and orders. To give validity to marketing agreements the Secretary must be an actual party to

<sup>6</sup> 7 U. S. C. Supp. IV, 602(1).

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the agreements. Section 8b.<sup>7</sup> The orders are also to be made by the Secretary for the purpose of regulating the handling of the agricultural commodity to which the particular order relates. Section 8c(3)(4).<sup>8</sup> That the field covered by the Agricultural Act is not coterminous with that covered by the Sherman Act is manifest from the fact that the former is thus delimited by the prescribed action participated in and directed by an officer of government proceeding under the authority specifically conferred by Congress. As to agreements and arrangements not thus agreed upon or directed by the Secretary, the Agricultural Act in no way impinges upon the prohibitions and penalties of the Sherman Act, and its condemnation of private action in entering into combinations and conspiracies which impose the prohibited restraint upon interstate commerce remains untouched.

It is not necessary to labor the point, for the Agricultural Act itself expressly defines the extent to which its provisions make the antitrust laws inapplicable. That definition is found in Section 8(b)<sup>9</sup> of the Agricultural Adjustment Act carried into the Agricultural Marketing Agreement Act in relation to marketing agreements, and provides as follows:

"In order to effectuate the declared policy of this chapter, the Secretary of Agriculture shall have the power, after due notice and opportunity for hearing, to enter into marketing agreements with processors, producers, associations of producers, and others engaged in the handling of any agricultural commodity or product thereof, only with respect to such handling as is in the current of interstate or foreign commerce or which directly burdens, obstructs, or affects interstate or foreign commerce in such commodity or product thereof. The making of any such agreement shall not be held to be in violation of any of the antitrust laws of the United States; and any such agreement shall be deemed to be lawful: *Provided*, That no such agreement shall remain in force after the termination of this chapter".

Another provision is found in Section 3(d)<sup>10</sup> of the Agricultural Marketing Agreement Act, relating to awards or agreements resulting from the arbitration or mediation by the Secretary of Agriculture or by a designated officer or employee of the Department of

<sup>7</sup> U. S. C. Supp. IV, Sec. 608b.

<sup>8</sup> U. S. C. Supp. IV, Sec. 608c(3)(4).

<sup>9</sup> U. S. C. Supp. IV, Sec. 608b.

<sup>10</sup> 50 Stat. 249.

Agriculture as provided in Section 3(a),<sup>11</sup> and meetings for that purpose and awards or agreements resulting therefrom which have been approved by the Secretary of Agriculture as provided in Section 3(b).<sup>12</sup> Section 3(d) provides:

"No meeting so held and no award or agreement so approved shall be deemed to be in violation of any of the antitrust laws of the United States".

These explicit provisions requiring official participation and authorizations show beyond question how far Congress intended that the Agricultural Act should operate to render the Sherman Act inapplicable.<sup>13</sup> If Congress had desired to grant any further immunity, Congress doubtless would have said so.

An agreement made with the Secretary as a party, or an order made by him, or an arbitration award or agreement approved by him, pursuant to the authority conferred by the Agricultural Act and within the terms of the described immunity, would of course be a defense to a prosecution under the Sherman Act to the extent that the prosecution sought to penalize what was thus validly agreed upon or directed by the Secretary. Further than that the Agricultural Act does not go.

We have no occasion to decide whether in any particular case an indictment under the Sherman Act by reason of its particular terms would be subject to demurrer, or to a motion to quash, upon the ground that the indictment ran against the provisions of such an agreement or order. We have no such situation here. There is indeed a contention that there was a license (No. 30) issued by the Secretary of Agriculture in 1934, amended in January, 1935, and in force until March 2, 1935, which related to the marketing of milk in the Chicago area, and hence that defendants operating under that license were not subject to the charges of the conspiracies alleged to have begun in January, 1935. But the allegations of the indictment are that the unlawful conspiracies continued throughout all the period mentioned in the indictment, that is, up to the time of its presentment in November, 1938. This clearly imports that the conspiracies were operative after the license came to an end and thus in the absence of any license. A conspiracy thus continued is in effect renewed during each day of its continuance. *United*

<sup>11</sup> 50 Stat. 248.

<sup>12</sup> 50 Stat. 248.

<sup>13</sup> See 77 Cong. Rec., Pt. II, p. 1977; Pt. III, p. 3117.

*States v. Kissel*, 218 U. S. 601, 607, 608; *Hyde v. United States*, 225 U. S. 347, 369; *Brown v. Elliott*, 225 U. S. 392, 400. It is also said that there is a recent marketing order under date of August 29, 1939,<sup>14</sup> which relates to the Chicago marketing area, and hence that this cause is moot. But that order affects a period subsequent to the time covered by the indictment. These contentions are unavailing in relation to the question before us.

Our conclusion is that the Agricultural Adjustment Act as re-enacted and amended by the Agricultural Marketing Agreement Act affords no ground for construing the Sherman Act as inapplicable to the charges contained in counts one, two and four.

(2). There remains the question whether the court below rightly held that the Capper-Volstead Act<sup>15</sup> had modified the Sherman Act so as to exempt the Pure Milk Association, a cooperative agricultural organization, and its officers and agents, from prosecution under these counts.

As to the Capper-Volstead Act the Court said:

"This Act legalizes price fixing for those within its purview. To that extent it modifies the Sherman Act. It removes from the Sherman Act those organizations, cooperative in their nature, which come within the purview of the Capper-Volstead Act. Prior to the Capper-Volstead Act farmers were treated no differently than others under the antitrust laws, so far as price fixing was concerned.

"The Capper-Volstead Act does not condemn any kind of monopoly or restraint of trade, or any price fixing, unless such monopoly or price fixing unduly enhances the price of an agricultural product. The Act then, by section 2 thereof, commits to an officer of the executive department, the Secretary of Agriculture, the power of regulation and visitation.

"Under this act farmers are favored under the antitrust laws in that they are given a qualified right, free from any criminal liability, to combine among themselves to monopolize and restrain interstate trade and commerce in farm products and to fix and enhance the price thereof.

"The court deduces from the Capper-Volstead Act that the Secretary of Agriculture has exclusive jurisdiction to determine and order, in the first instance, whether or not farmer cooperatives, in their operation, monopolize and restrain interstate trade and commerce 'to such an extent that the price of any agri-

<sup>14</sup> Federal Register, August 30, 1939, Order No. 41, Vol. 4, pp. 3764-3768, 3770.

<sup>15</sup> 42 Stat. 388, 7 U. S. C. 291, 292.

cultural product is unduly enhanced'. Until the Secretary of Agriculture acts, the judicial power cannot be invoked". 28 Supp., pp. 183, 184.

We are unable to accept that view. We cannot find in the Capper-Volstead Act, any more than in the Agricultural Act, an intention to declare immunity for the combinations and conspiracies charged in the present indictment. Section 6 of the Clayton Act, enacted in 1914,<sup>16</sup> had authorized the formation and operation of agricultural organizations provided they did not have capital stock or were conducted for profit, and it was there provided that the antitrust laws should not be construed to forbid members of such organizations "from lawfully carrying out the legitimate objects thereof". They were not to be held illegal combinations. The Capper-Volstead Act, enacted in 1922,<sup>17</sup> was made applicable as well to cooperatives having capital stock. The persons to whom the Capper-Volstead Act applies are defined in Section one as producers of agricultural products, "as farmers, planters, ranchmen, dairymen, nut or fruit growers". They are authorized to act together "in collectively processing; preparing for market, handling, and marketing in interstate and foreign commerce" their products. They may have "marketing agencies in common", and they may make "the necessary contracts and agreements to effect such purposes".

The right of these agricultural producers thus to unite in preparing for market and in marketing their products, and to make the contracts which are necessary for that collaboration, cannot be deemed to authorize any combination or conspiracy with other persons in restraint of trade that these producers may see fit to devise. In this instance, the conspiracy charged is not that of merely forming a collective association of producers to market their products but a conspiracy, or conspiracies, with major distributors and their allied groups, with labor officials, municipal officials, and others, in order to maintain artificial and non-competitive prices to be paid to all producers for all fluid milk produced in Illinois and neighboring States and marketed in the Chicago area, and thus in effect, as the indictment is construed by the court below, "to compel independent distributors to exact a like price from their customers" and also to control "the supply of fluid milk per-

<sup>16</sup> 38 Stat. 731.

<sup>17</sup> 42 Stat. 388.

mitted to be brought to Chicago". 28 F. Supp. 180-182. Such a combined attempt of all the defendants, producers, distributors and their allies, to control the market finds no justification in Section one of the Capper-Volstead Act.

Nor does the court below derive its limitation of the Sherman Act from Section one. The pith of the court's conclusion is that under Section two an exclusive jurisdiction with respect to the described cooperative associations is vested, in the first instance, in the Secretary of Agriculture, and that, until the Secretary acts, the judicial power to entertain a prosecution under the Sherman Act cannot be invoked. Section two of the Capper-Volstead Act does provide a special procedure in a case where the Secretary of Agriculture has reason to believe that any such association "monopolizes" or restrains interstate trade "to such an extent that the price of any agricultural product is unduly enhanced". Thereupon the Secretary is to serve upon the association a complaint, stating his charge with notice of hearing. And if upon such hearing the Secretary is of the opinion that the association "monopolizes", or does restrain interstate trade to the extent above mentioned, he then is to issue an order directing the association "to cease and desist" therefrom. Provision is made for judicial review.

We find no ground for saying that this limited procedure is a substitute for the provisions of the Sherman Act, or has the result of permitting the sort of combinations and conspiracies here charged unless or until the Secretary of Agriculture takes action. That this provision of the Capper-Volstead Act does not cover the entire field of the Sherman Act is sufficiently clear. The Sherman Act authorizes criminal prosecutions and penalties. The Capper-Volstead Act provides only for a civil proceeding. The Sherman Act hits at attempts to monopolize as well as actual monopolization. And Section two of the Capper-Volstead Act contains no provision giving immunity from the Sherman Act in the absence of a proceeding by the Secretary. We think that the procedure under Section two of the Capper-Volstead Act is auxiliary and was intended merely as a qualification of the authorization given to cooperative agricultural producers by Section one, so that if the collective action of such producers, as there permitted, results in the opinion of the Secretary in monopolization or unduly enhanced prices, he may intervene and seek to control the action thus taken under Section one. But as Section one cannot be regarded as authorizing the sort

of conspiracies between producers and others that are charged in this indictment, the qualifying procedure for which Section two provides is not to be deemed to be designed to take the place of, or to postpone or prevent, prosecution under Section one of the Sherman Act for the purpose of punishing such conspiracies.

*Fifth.* Having dealt with the construction placed by the court below upon the Sherman Act, our jurisdiction on this appeal is exhausted. We are not at liberty to consider other objections to the indictment or questions which may arise upon the trial with respect to the merits of the charge. Nor it is well settled that where the District Court has based its decision on a particular construction of the underlying statute, the review here under the Criminal Appeals Act is confined to the question of the propriety of that construction. *United States v. Keitel, supra; United States v. Kissel, supra, p. 606; United States v. Miller, 223 U. S. 599, 602; United States v. Carter, supra; United States v. Colgate, supra; United States v. Schrader's Son, supra; United States v. Hastings, supra.* The case of *United States v. Curtiss-Wright Corporation, 299 U. S. 304*, is not opposed, as there the decision of the District Court was not based upon a particular construction of the underlying statute, but upon its invalidity, and the jurisdiction of this Court extended to the consideration of the rulings of the District Court which dealt with that question.

The limitation applicable in the instant case to the question of the District Court's construction of the Sherman Act disposes of the contention urged by some of the defendants that counts two and four do not show such a direct restraint upon interstate commerce as to bring the acts charged within the statute. The District Court said in its opinion that, in view of its rulings (above discussed) as to counts one, two and four, it was unnecessary to decide "whether or not the allegations of the indictment show that interstate commerce was or was not restrained". 28 U. S. 187, p. 187. In its judgment the court formally overruled all objections to these counts so far as the objections rested on the ground that interstate commerce was not involved. If these rulings be treated as dealing merely with the construction of the indictment, they must be accepted here. *United States v. Patten, supra; United States v. Colgate, supra; United States v. Hastings, supra.* But, apart from that, the District Court certainly has not construed the Sherman Act as inapplicable upon the ground that interstate com-

merce is not involved, and the question of the bearing upon that commerce of the acts charged is not before us.

Similarly, the contention of the defendants who are labor officials that the Sherman Act does not apply to labor unions or labor union activities is not open on this appeal. The District Court did not construe the Sherman Act as inapplicable to these defendants and the Government's appeal, under the restriction of the Criminal Appeals Act, does not present that question.

The appeal as to count three is dismissed. The judgment is reversed as to counts one, two and four, and the cause is remanded to the District Court for further proceedings in conformity with this opinion.

*It is so ordered.*

A true copy.

Test:

*Clerk, Supreme Court, U. S.*